

2012

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Recommended Citation

Craig H. Allen, *Proving Corporate Criminal Liability for Negligence in Vessel Management and Operations: An Allision-Oil Spill Case Study*, 10 LOY. MAR. L.J. 269 (2012), <https://digitalcommons.law.uw.edu/faculty-articles/81>

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PROVING CORPORATE CRIMINAL LIABILITY FOR NEGLIGENCE IN VESSEL MANAGEMENT AND OPERATIONS: AN ALLISION-OIL SPILL CASE STUDY

*Craig H. Allen**

I. INTRODUCTION

Maritime policy analysts often invoke the “vessel safety net” metaphor to explain the independent, but overlapping, risk management roles and responsibilities of the vessel master and crew, owner and charterer, operating company, classification society, flag state and port states. Oil spills from the 2002 M/T *Prestige* break up off the coast of Galicia, Spain, the 2007 M/V *Cosco Busan* bridge allision in San Francisco Bay and the 2010 *Deepwater Horizon* debacle in the Gulf of Mexico, among others, demonstrate that any or all of the components of that safety net may come under scrutiny following a marine casualty, possibly leading to civil and even criminal liability.

In response to the 2002 M/T *Prestige* spill, for example, the government of Spain (a coastal state impacted by the spill) imprisoned the Bahamian vessel’s Greek master¹ and brought

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1. Spain arrested the *Prestige*’s 69-year-old Greek master, Apostolos Mangouras, when he arrived in Spain. He was accused of not cooperating with salvage crews and harming the environment and served 83 days in a high-security prison following the incident. He was eventually released on bail, but was not permitted to leave Spain, after the Shipowners’ Protection and Indemnity Association, the London P&I Club, went beyond its customary practice of insuring owners alone to post bail in the amount of €3 million on behalf of the vessel’s master. To the surprise and dismay of maritime labor groups, the European Court of Human Rights rejected Mangouras’s challenge to Spain’s extraordinarily high bail demand. See *Int’l Transport Workers’ Fed., ITF and ETF Condemn Judgment on Prestige Master Case* (Oct. 22, 2010), available at <http://www.itfglobal.org/news-online/index.cfm/newsdetail/5291/region/0/section/0/order/1>. The ECHR opinion is reported

suit in a United States court against the vessel's classification society, American Bureau of Shipping (now ABS), for compensatory damages of \$1 billion or more, plus unspecified punitive damages.² Following the 2007 M/V *Cosco Busan* incident, the United States indicted the vessel's pilot for his conduct leading up to the allision. Fleet Management, Ltd. (Fleet), the Hong Kong vessel's corporate operator, was also indicted. In 2011, the Republic of the Marshall Islands came under stinging criticism in a Coast Guard investigation into the causes of the *Deepwater Horizon* oil spill for what could be deemed flag state negligence.³ A spokesman for the Marshall Islands delivered a swift rejoinder.⁴ The exchange came not long after a chamber of the International Tribunal for the Law of the Sea issued a potentially far-reaching advisory opinion on state responsibility and liability for at-sea activities by their nationals, potentially tightening up the mesh size of the vessel safety net.⁵

Some might be tempted to dismiss or downplay the issue of corporate criminal liability as inconsequential, because of the often heard complaint that corporations cannot be imprisoned and any fine is so small as to be a mere cost of doing business. However, close inspection of what some refer to as the Alternative Fines Act⁶ suggests it would be naïve to trivialize the prospect of corporate criminal liability. That statute increases the maximum fines that may be imposed under the Clean Water Act, and other

at *Mangouras v. Spain*, no. 12050/04 Eur. Ct. H. R. (2010). See generally International Maritime Organization-International Labor Organization, Guidelines on Fair Treatment of Seafarers in the Event of Maritime Accidents, IMO Res. LEG.3(91) (2006), available at [http://www.imo.org/OurWork/Legal/JointIMOILOWorkingGroupsOnSeafarerIssues/Documents/LEG3\(91\).pdf](http://www.imo.org/OurWork/Legal/JointIMOILOWorkingGroupsOnSeafarerIssues/Documents/LEG3(91).pdf); Tullio Treves, *Human Rights and the Law of the Sea*, 28 BERKELEY J. INT'L L. 1, 11-12 (2010).

2. The court eventually granted summary judgment to ABS. *Reino de España v. Am. Bureau of Shipping, Inc.*, 729 F. Supp. 2d 635 (S.D.N.Y. 2010).

3. See David Hammer, *Coast Guard criticizes foreign flag state in Deepwater Horizon blast*, THE TIMES PICAYUNE, Apr. 22, 2011, available at http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/04/coast_guard_investigative_repo.html.

4. Republic of the Marshall Islands Maritime Administrator Marks Anniversary of DEEPWATER HORIZON, Apr. 22, 2011, available at http://www.brymar-consulting.com/wp-content/uploads/Misc/RMI_110422.pdf.

5. International Tribunal for the Law of the Sea, Seabed Disputes Chamber, Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area (Advisory Opinion), Feb. 1, 2011, available at http://www.itlos.org/start2_en.html. The implications of this thorough and carefully crafted opinion for the law of flag state responsibility in matters other than exploitation of deep seabed resources are beyond the scope of this article.

6. 18 U.S.C. § 3571 (2006).

statutes, to as much as twice the amount of the pecuniary loss that the violation caused to other persons.⁷ While the \$10 million criminal fine eventually imposed on the *Cosco Busan* operator as a result of a plea agreement might not seem particularly remarkable by today's civil or criminal liability standards, with an incident like the *Deepwater Horizon*, which resulted in clean up costs and damage claims in the billions, the "pecuniary loss" formula could result in a truly astronomical fine.⁸ Evidence developed during the criminal investigation might also lead to collateral consequences, including loss of opportunity for the ship owner or operator to limit liability under the U.S. Limitation of Liability Act⁹ or the Oil Pollution Act of 1990,¹⁰ loss of or ineligibility for government contracts¹¹ and, for publicly traded corporations, a potentially embarrassing requirement to disclose to shareholders information regarding enforcement actions and potential liabilities.¹² Finally, some violations render the involved vessel subject to forfeiture.¹³

It now seems clear that criminal liability for the harm caused by a marine casualty can extend beyond those on board the vessels who might have been guilty of "operational negligence." This article examines one particular aspect of the emerging development: the potential criminal liability of the vessel owner or operator, typically a corporation, for a discharge of oil in violation of the Clean Water Act. Recent cases have

7. Ordinarily, the maximum statutory fine for an organization that negligently discharges oil in violation of the Clean Water Act would be \$200,000. See 18 U.S.C. § 3571(c)(5) (2006). Any fact that increases the penalty above that maximum, under the pecuniary loss option in 18 U.S.C. § 3571(d), must be charged in the indictment, submitted to the jury and proven beyond a reasonable doubt. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Apparently, in order to take advantage of this option in the *Cosco Busan* prosecution of Fleet and comply with *Apprendi*, the Government filed a third superseding indictment alleging that Fleet's negligence caused "at least approximately \$20 million in pecuniary losses." See *United States v. Cota*, No. CR 08-0160, 2008 U.S. Dist. LEXIS 85186, at 9-10 (N.D. Cal. Oct. 7, 2008).

8. As of February 1, 2012, when research for this article was completed, none of the corporations involved in the *Deepwater Horizon*-Macondo oil spill had been indicted for criminal Clean Water Act violations.

9. 46 U.S.C. § 30505 (2006).

10. 33 U.S.C. § 2704(c)(1)(B) (2006).

11. 33 U.S.C. § 1368 (2006).

12. See, e.g., Securities & Exchange Comm'n, Item 103 of Regulation S-K, 17 C.F.R. § 229.103 (2011).

13. In the *Cosco Busan* litigation, the Department of Justice sought forfeiture of the vessel pursuant to the Park System Resource Protection Act, 16 U.S.C. § 191j-1(b) (2006), and the National Marine Sanctuaries Act, 16 U.S.C. § 1437(e)(1) (2006).

demonstrated that the owner's or operator's criminal liability may be based on either vicarious liability for the criminal acts of a mariner employed by the owner or operator or on a direct liability theory. Civil liability based on vicarious liability is nothing new. But vicarious criminal liability remains somewhat controversial.¹⁴ However, because vicarious criminal liability is relatively easy to establish,¹⁵ this article will only briefly examine the duties relevant to a vicarious liability theory before turning to the alternative direct liability theory for what some refer to as "negligent management." It does so by examining the possible means by which the direct criminal liability of the operator of the *Cosco Busan* might have been established, had the case gone to trial.

It must be emphasized that the factual allegations regarding the defendants' conduct in the *Cosco Busan* allision and spill have been selected for illustrative purposes, to provide the reader with a "case study" for demonstrating how a charge of direct criminal liability of a vessel owner might be discovered, developed and proved.¹⁶ Because that case was disposed of by plea agreement, the allegations were never proven by the relevant criminal law standard.¹⁷ The reader must also bear in mind that this analysis focuses primarily on proof of a charge of negligent discharge of oil in violation of the Clean Water Act. It may or may not be relevant

14. See Katherine A. Swanson, Comment: The Cost of Doing Business: Corporate Vicarious Criminal Liability for Negligent Discharge of Oil under the Clean Water Act, 84 WASH. L. REV. 555 (2009).

15. A complaint occasionally made by Responsible Parties (RP) and their insurers is that negligence is so easy to allege that the Government might be tempted to threaten prosecution in order to coerce the RP into continuing to fund removal actions even after the RP's limits of liability under the Oil Pollution Act of 1990 have been reached.

16. The sources relied on include the NTSB, Coast Guard and Board of Pilot Commissioners' investigation reports, along with the public docket materials on the NTSB's supporting Docket Management System (DMS) web site. See NTSB, Docket Management System, available at <http://dms.nts.gov/pubdms/search/hitlist.cfm>.

17. Fleet's guilty plea admitted that the crew of the vessel was not adequately familiar with certain ship-specific navigational equipment, did not engage in a berth-to-berth passage planning process or prepare written berth-to-berth passage plans, did not conduct an adequate master-pilot exchange of information, did not fully utilize or operate the ship's radar and electronic chart system and did not take fixes during the voyage. See Joint Factual Statement attached to Plea Agreement, United States v. Fleet Mgmt., Ltd., CR No. 08-0160 SI, filed Aug. 13, 2009; Press Release, Env't & Natural Res. Div., U.S. Dep't of Justice, Cosco Busan Operator Admits Guilt in Causing Oil Spill (Aug. 13, 2009), available at <http://www.justice.gov/opa/pr/2009/August/09-enrd-797.html>.

to violations of other statutes, even those incorporating a negligence *mens rea*.¹⁸ Further, it is important to note that the sources of the standard of care examined in this case study might not be applicable in other cases, depending on the location of the conduct involved and the nature, tonnage, route and flag of the vessel. The *Cosco Busan* allision and oil spill occurred in the internal waters of the United States. Had the spill occurred offshore, relevant provisions of MARPOL¹⁹ and the U.N. Convention on the Law of the Sea²⁰ might have to be considered, to the extent that those latter provisions are binding on the U.S. as a matter of customary international law. Finally, every case study is a product of the laws and regulations in effect at the time and place of the occurrence. This particular case study is set in the year 2007. Later incidents must of course be evaluated under the then-existing legal regime.

Part I of the article summarizes factual allegations and findings in the public record surrounding the 2007 *Cosco Busan* allision and the criminal charges that followed. Part II then examines the two theories (direct and vicarious) for establishing corporate criminal liability. Part III identifies the duties relevant to a vicarious liability theory, and Part IV examines the ship owner and operator duties relevant to a direct liability theory. Part V then draws on the *Cosco Busan* incident as a case study to demonstrate how direct liability for a negligent discharge of oil in violation of the Clean Water Act might be proved.

18. Other commonly charged maritime crimes that may incorporate different mental elements include the so-called Seaman Manslaughter Statute (18 U.S.C. § 1115), the Refuse Act (33 U.S.C. § 407) and the Act to Prevent Pollution from Ships (33 U.S.C. § 1907). The Refuse Act is a strict liability offense, requiring no proof of intent or negligence. IMC Shipping Company, the operator of the M/V *Selendang Ayu*, which ran aground in the Aleutian Islands in late 2005 after suffering an engine casualty, was charged with violating the Refuse Act as a result of the spill of some 340,000 gallons of fuel oil and its cargo of soybeans. IMC pleaded guilty and was fined \$10 million. See Press Release, Env't & Natural Resources Div., U.S. Dep't of Justice, Ship Operator Pleads Guilty and Sentenced to Pay \$10 Million Related to Charges Arising from Grounding in the Aleutians (August 22, 2007), available at http://www.justice.gov/opa/pr/2007/August/07_enrd_644.html.

19. International Convention for the Prevention of Pollution of the Sea by Vessels [MARPOL], Nov. 2, 1973, T.I.A.S. No. 10561, 1340 U.N.T.S. 184, 12 I.L.M. 1319 (1973), as amended by 1978 Tanker Safety and Pollution Prevention Protocol, June 1, 1978, 1340 U.N.T.S. 61, 17 I.L.M. 546 (1978).

20. See, e.g., U.N. Convention on the Law of the Sea, pt. XII, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (1982).

II. THE COSCO BUSAN ALLISION: NEGLIGENCE ON BOARD OR IN THE BOARD ROOM?

Despite the name of the South Korean shipping giant “Hanjin” painted in block letters several feet tall on both sides of its 901-foot-long hull,²¹ the Hong Kong-registered containership M/V *Cosco Busan* was neither owned nor operated by that Korean company, but rather by a Byzantine web of ship owning and operating companies based in Hong Kong (“Cosco” is the acronym for the government-owned China Ocean Shipping Company). On the day of the allision, the vessel was owned by Regal Stone, Ltd. (Regal) and operated by Fleet Management, Ltd., the fourth largest ship management company in the world, with its headquarters in Hong Kong.²² Fleet was, in turn, wholly owned by The Noble Group, Ltd. The master, officers and crew of the *Cosco Busan* were all Chinese nationals, who were on the third leg of their first voyage with the vessel, which began in Busan two weeks before the allision. Although the vessel was a container ship, not a tanker, its fuel capacity was more than two million gallons.²³

Regal took ownership of the *Cosco Busan* on October 24, 2007, and turned the ship over to Fleet to manage. The ship sailed from Busan, Republic of Korea, to Long Beach, California the next day. After a brief stop in Long Beach for cargo operations, the ship journeyed north to Oakland via San Francisco Bay. The National Transportation Safety Board (NTSB)²⁴ determined that on November 7, 2007, the *Cosco Busan*

21. The vessel, which can be tracked by its IMO Number 9231743, regardless of any name changes, was formerly named the *Hanjin Cairo*. It was renamed the *Cosco Busan* in November of 2006. According to the U.S. Coast Guard Port State Information Exchange (PSIX) database, the vessel is now named the *Haijin Venezia*.

22. Nat'l Transp. Safety Bd., NTSB/MAR-09/01, Marine Accident Report: Allision of Hong Kong-Registered Containership M/V *Cosco Busan* with the Delta Tower of the San Francisco-Oakland Bay Bridge [NTSB Report] at 4 (2009), available at <http://www.nts.gov/Publictn/2009/MAR0901.pdf>. See also Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun, Incident Review Committee Report: Nov. 7, 2007 Allision with the San Francisco-Oakland Bay Bridge, Oct. 23, 2008, available at http://www.bopc.ca.gov/res/docs/notices/Cota_IRC_Report.pdf.

23. NTSB Report, *supra* note 22 at 33 (reporting a capacity of 2.069 million gallons of intermediate fuel oil and 107,000 gallons of marine diesel oil).

24. *Id.*; see also U.S. Coast Guard, Report of the Investigation into the Allision of the COSCO BUSAN with the Delta Tower of the San Francisco Bay Bridge in San Francisco Bay on November 7, 2007 [U.S. Coast Guard Report], Mar. 2, 2009, redacted version available at <http://www.uscg.mil/foia/CoscoBusan/COSCO>

was scheduled to depart its berth at pier 56 in the Port of Oakland at 0700. The ship was carrying 2,529 containers and was destined for Busan. A pilot from the San Francisco Bar Pilots Association was assigned to navigate the vessel from the time it left the berth until it exited the bay. Dense fog was restricting visibility in the bay when the pilot boarded the vessel at about 0620. When he arrived on the bridge, he introduced himself to the ship's master and handed him a San Francisco Bar Pilots' pilot card. The master asked the pilot, "...can go?" to which the pilot replied that they would "take a look at things" and see how the visibility developed.

The vessel's third mate, who was serving as the bridge watch officer for the outbound passage, provided the pilot with the vessel's pilot card, which contained ship characteristics and ship maneuvering performance data. The pilot acknowledged receipt of this information by signing the document, noting "rec'd only" next to his signature and citing the name of the assist tug to be used just below his signature. This same pilot card had a checklist for the crew to use before departing to verify that the ship's vital navigation, steering and mooring gear had been tested and was operational. About 0800, the vessel got underway with the aid of a tractor tug. About this time, the voyage data recorder (VDR) recorded the voice of a crewmember saying, in Mandarin, "American ships under such conditions, they would not be under way."²⁵

The vessel proceeded outbound on a slow bell until 0820, when the pilot ordered half ahead. At about 0826, he ordered the engines full ahead, despite the fact that the pilot was uncertain of his position, complained of a radar malfunction, expressed confusion over the ECDIS²⁶ symbology and had apparently lost

BUSANfinal030609.pdf. Coast Guard marine casualty investigations are inadmissible in civil or administrative proceedings, other than an administrative proceeding initiated by the United States. 46 U.S.C. § 6308 (2006).

25. Transcripts of the VDR recordings are available on the NTSB DMS web site, *supra* note 16. Reportedly, four other deep draft ships delayed their departures that morning until visibility improved. See MSNBC.com, Ship in Bay Area spill was only one to sail in fog, Mar. 27, 2008, available at http://www.msnbc.msn.com/id/23829561/ns/us_news-environment/t/ship-bay-area-spill-was-only-one-sail-fog/. Visibility and departure delays are discussed in Board of Pilot Commissioners Report, *supra* note 22 at 6.

26. ECDIS is the acronym for Electronic Chart Display and Information System, which is now required on most large merchant vessels. ECDIS integrates vessel position information with a digitized navigation chart. A number of companies

situational awareness. At approximately 0830, following a radio inquiry regarding the vessel's intentions from the San Francisco Vessel Traffic Service (VTS) and a series of last minute evasive course changes, the vessel allided with the fendering system at the base of the Delta tower of the San Francisco–Oakland Bay Bridge. Contact with the bridge tower tore open a 212-foot-long by 10-foot-high by 8-foot-deep gash in the forward port side of the ship and breached the Numbers 3 and 4 port fuel tanks and the Number 2 port ballast tank. As a result of the breached fuel tanks, about 53,500 gallons of fuel oil were released into San Francisco Bay. No injuries or fatalities resulted from the accident; however, according to the NTSB estimate, the fuel spill contaminated about 26 miles of shoreline, killed more than 2,500 birds representing some 50 species, temporarily closed a fishery on the bay and delayed the start of the crab-fishing season. The NTSB estimated total monetary damages to be \$2.1 million for the ship, \$1.5 million for the bridge and more than \$70 million for environmental cleanup.

On March 17, 2008, the U.S. Department of Justice filed a two count criminal Information against the vessel's pilot for violations of the Clean Water Act²⁷ and Migratory Bird Treaty Act.²⁸ On July 23, 2008, a federal grand jury returned an indictment against both the pilot and the vessel's operator, Fleet Management, Ltd.²⁹ The new indictment alleged two False

manufacture and market ECDIS units. See U.S. Coast Guard Report, *supra* note 24, at 4-5; International Convention for the Safety of Life at Sea [SOLAS], Reg. V/19.2.1.4, Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. 9700, 1184 U.N.T.S. 2; as amended by the Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, 1974, Feb. 17, 1978, 32 U.S.T. 5577, T.I.A.S. 10009, 1226 U.N.T.S. 237; U.S. Coast Guard, Navigation and Vessel Inspection Circular (NAVIC) 02-03 (2003).

27. 33 U.S.C. § 1319(c)(1)(A) (2006). Information, United States v. John Cota, Mar.17, 2008, *available at* http://www.justice.gov/usao/can/community/Notifications/documents/2008_03_17_cota_information.pdf. The charges set out in the Information were later incorporated into a superseding indictment that added a false statement charge. See Superseding Indictment, United States v. John Cota, Apr. 22, 2008, *available at* http://www.justice.gov/usao/can/press/press_documents/S-Indictment.pdf. On March 6, 2009, Cota pleaded guilty and was later sentenced to ten months imprisonment. See Press Release, Env't & Natural Res. Div., U.S. Dep't of Justice, Prison Sentence for Cosco Busan pilot (July 17, 2009), *available at* <http://www.justice.gov/opa/pr/2009/July/09-enrd-698.html>.

28. 16 U.S.C. §§ 703,707 (2006).

29. See Press Release, Env't & Natural Res. Div., U.S. Dep't of Justice, Company that Managed Cosco Busan Indicted on New Charges (July 23, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/July/08-enrd-642.html>.

Statement Act³⁰ violations against the pilot, Migratory Bird Treaty Act and Clean Water Act violations against the pilot and Fleet and three False Statement Act violations and three Obstruction of Justice³¹ violations against Fleet alone. The indictment alleged that Fleet violated the Clean Water Act by negligently discharging oil into the navigable waters of the United States.³² It also charged the company with falsifying documents after the allision to cover up the company's negligence.³³

Fleet initially sought to enter a plea of *nolo contendere*, arguing to the court that it played no role in the allision. In its motion, Fleet alleged that the allision was caused solely by the negligence of the pilot, the U. S. Coast Guard, the California Board of Pilot Commissioners, the San Francisco Bar Pilots Association and the doctor who examined the pilot. On October 7, 2008, the trial court denied Fleet's motion.³⁴ Fleet eventually pled guilty to charges of negligently causing the oil spill and of obstruction of justice and making a false official statement.³⁵ On February 23, 2009, the company was sentenced by the federal district court to pay a fine of \$10 million and to comply with certain remedial measures.³⁶

On September 19, 2011, the final chapter of the 2007 *Cosco Busan* criminal and civil litigation by the U.S. against the vessel and her owners and operators was closed. On that day, the U.S. Department of Justice, the State of California, the city and county of San Francisco and the city of Richmond, Calif., signed

30. 18 U.S.C. § 1001 (2006).

31. 18 U.S.C. § 1519 (2006).

32. 33 U.S.C. § 1319(c)(1)(A) (2006).

33. This count included allegations that Fleet or its officers had falsified the ship's navigational chart to show fixes that were not actually recorded during the voyage, concealed ship's records and created materially false, fictitious and forged documents with an intent to influence the Coast Guard's investigation. The alleged forged documents included a false berth-to-berth passage plan for the day of the allision, which was allegedly created after the incident at the direction of shore-side supervisors and with the knowledge of the ship's master.

34. *United States v. Cota*, No. CR 08-0160, 2008 U.S. Dist. LEXIS 85186, at 3-4 (N.D. Cal. Oct. 7, 2008).

35. See Press Release, Env't & Natural Res. Div., U.S. Dep't of Justice, *Cosco Busan Operator Admits Guilt in Causing Oil Spill* (Aug. 13, 2009), available at <http://www.justice.gov/opa/pr/2009/August/09-enrd-797.html>. None of the officers or crew of the *Cosco Busan* were charged, nor were any officers or directors of Fleet.

36. *United States v. Fleet Mgmt., Ltd.*, No. 08-0160 SI, judgment entered (N.D. Cal. Feb. 23, 2010).

and lodged a consent decree that requires Regal and Fleet to pay \$44.4 million for natural resource damages and penalties and to reimburse the governmental entities for response costs incurred as a result of the oil spill.³⁷

When the guilty plea agreement with Fleet was announced in 2009, U.S. Department of Justice (DOJ) spokesmen made clear their resolve to scrutinize the conduct of vessel owners and operators whose ships pollute U.S. waters for evidence of direct criminal liability. One spokesman announced the Government's view that "navigation of large vessels is a serious undertaking and those who fail to adequately train, execute and supervise their responsibilities will be held accountable."³⁸ Another added that the defendant, Fleet, "failed to meet its obligation under international law to ensure the crew was adequately trained on navigation procedures and equipment. Vessel operators cannot abdicate their responsibilities to ensure safety and environmental protection without suffering serious consequences."³⁹

Had Fleet contested the charges, the government would have been required to establish the company's culpability beyond a reasonable doubt. As highlighted above, the general rule is that corporate criminal liability may be established through vicarious liability, direct liability or a combination of the two. The general rule is of course subject to the actual language of the particular statute the corporation is charged with violating and any relevant legislative intent, which might expressly include or foreclose vicarious liability.

37. See Press Release, Env't Natural Res. Div., U.S. Dep't of Justice, Ship Owners and Operators to Pay \$44 million in Damages and Penalties for 2007 San Francisco-Oakland Bay Bridge Crash and Oil Spill (Sept. 19, 2011), available at <http://www.justice.gov/opa/pr/2011/September/11-enrd-1209.html>. See generally *United States v. M/V Cosco Busan*, 557 F.Supp.2d 1058, (N.D. Cal. May 9, 2008) (generally describing the nature of the civil claims while denying defendants' motion to dismiss).

38. Press Release, Env't & Natural Res. Div., U.S. Dep't of Justice, John C. Cruden, Acting Attorney General for DOJ Environmental and Natural Resources Division, in *Cosco Busan Operator Admits Guilt in Causing Oil Spill*, Aug. 13, 2009, available at <http://www.justice.gov/opa/pr/2009/August/09-enrd-797.html>.

39. *Id.*, statement of Joseph P. Russoniello, U.S. Attorney for the Northern District of California.

III. THEORIES OF CORPORATE CRIMINAL LIABILITY

In the aftermath of the 1989 T/V *Exxon Valdez* oil spill, Congress enacted the Oil Pollution Act of 1990 (OPA 90).⁴⁰ One section of OPA 90 amended the Clean Water Act to prescribe criminal sanctions for negligent or knowing discharges of oil in violation 33 U.S.C. § 1321(b)(3).⁴¹ The CWA prohibition extends to any “person” who negligently discharges oil into waters of the United States. “Person” is defined to include corporations⁴² and any “responsible corporate officer.”⁴³ As with the civil tort of negligence, more than one person’s negligence may cause the harm (an oil discharge in this case); therefore, more than one person might be found guilty of negligently causing a particular discharge of oil (as were the pilot and Fleet in this case).

As discussed more fully in section IV, corporations generally bear direct liability for negligent acts or omissions by their officers and other high level managers. The CWA is silent on whether it includes or precludes vicarious criminal liability for entities whose lower level agents or employees commit violations of the act and on the elements of a “negligent” discharge. Admiralty courts may therefore turn to the law of Agency to determine the parameters of a principal’s liability for the acts or omissions of its agent or employee.⁴⁴ The Restatement (Third) of Agency distinguishes between direct and vicarious liability in Section 7.03 (Principal’s Liability--In General):⁴⁵

(1) A principal is subject to direct liability to a third party harmed by an agent’s conduct when

(a) as stated in § 7.04, the agent acts with actual authority or the principal ratifies the agent’s conduct and (i) the agent’s conduct is tortious, or (ii) the agent’s conduct, if that of the principal, would subject the principal to tort liability; or

40. Oil Pollution Control Act 1990, Pub. L. No. 101-380, 104 Stat. 484; H.R. Rep. No. 101-653, reprinted in 1990 U.S.C.C.A.N. 779.

41. Oil Pollution Control Act 1990, Pub. L. No. 101-380, 104 Stat. 484 § 4301(c)(2), (3); H.R. Rep. No. 101-653, at 154 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 833.

42. 33 U.S.C. § 1362(5) (2006).

43. 33 U.S.C. § 1319(c)(6) (2006).

44. *Dubret v. Holland Am. Line Westours*, 25 F. Supp. 2d 1151 (W.D. Wash. 1998) (acknowledging that admiralty has adopted agency principles).

45. American Law Institute, Restatement (Third) of Agency § 7.03 (2006) (emphasis added).

(b) as stated in § 7.05, the principal is negligent in selecting, supervising, or otherwise controlling the agent; or

(c) as stated in § 7.06, the principal delegates performance of a duty to use care to protect other persons or their property to an agent who fails to perform the duty.

(2) A principal is subject to vicarious liability to a third party harmed by an agent's conduct when

(a) as stated in § 7.07, the agent is an employee who commits a tort while acting within the scope of employment; or

(b) as stated in § 7.08, the agent commits a tort when acting with apparent authority in dealing with a third party on or purportedly on behalf of the principal.

A principal's liability under agency theories is most commonly associated with civil tort. And, even in civil-admiralty matters, the general maritime law and some statutes limit the shipowner's vicarious liability. For example, in the *Amiable Nancy*, Justice Story writing for the U.S. Supreme Court, held that punitive damages may not be imposed on a shipowner for the acts of its captain or crew unless the owner either directed or participated in the offense.⁴⁶ Similarly, the Limitation of Liability Act⁴⁷ and the "error in navigation" defense under Carriage of Goods by Sea Act⁴⁸ shield the shipowner from vicarious liability claims or at least limit that liability in some circumstances.

46. 16 U.S. 546 (1818). *See also* RESTATEMENT (SECOND) OF TORTS § 909 (1979). *But see* CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 705 (1st Cir. 1995) (upholding imposition of punitive damages under vicarious liability theory). The U.S. Supreme Court, in *Exxon Shipping Co. v. Baker*, was equally divided on whether maritime law allowed corporate liability for punitive damages based on the acts of managerial agents. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 484 (2008). It therefore left the court of appeals' opinion undisturbed in this respect, noting that the disposition here was not precedential on the derivative-liability question. *See generally* Christopher R. Green, Punishing Corporations: The Food Chain Schizophrenia in Punitive Damages and Criminal Law, 87 NEB. L. REV. 197 (2008) (examining the question how high up the corporate "food chain" must misconduct extend before the corporation will be held criminally liable or civilly liable for punitive damages).

47. 46 U.S.C. § 30505 (2006) (opportunity for ship owner or charterer to limit liability turns on whether the causative negligence occurred within the privity or knowledge of the vessel owner or charterer).

48. Act of 1936 (Carriage of Goods by Sea Act), § 4(2)(a) (neither the carrier nor the ship shall be liable for cargo loss arising from negligence in navigation or

Criminal responsibility based on vicarious liability is not unknown to the law.⁴⁹ In *United States v. Ionia Management S.A.*⁵⁰ the U.S. Court of Appeals for the Second Circuit addressed the distinction between vicarious liability and direct liability in a 2009 criminal case against a ship management company. In the trial below, the district court instructed the jury that

As a legal entity, a corporation can only act vicariously through its agents; that is, through its directors, officers, and employees or other persons authorized to act for it. A corporation may be held criminally liable for the acts of its agent done on behalf of and for the benefit of the corporation, and directly related to the performance of the duties the employee has authority to perform.⁵¹

The district court went on to instruct the jury that:

...You have been instructed that Ionia, as a corporate entity, is legally responsible for the acts or omissions of its agents or employees under certain circumstances. You must find that the Government has proven beyond a reasonable doubt that acts attributable to Ionia were acts or omissions of its agents performed “within the scope of their employment” with Ionia as I will now define that term.

An act or omission that was specifically authorized by the corporation would be within the scope of the agent's employment. Even if the act or omission was not specifically authorized, it may still be within the scope of an agent's employment if (1) the agent acted for the benefit of the corporation and (2) the agent was acting within his authority. It is not necessary that the Government prove that the corporation was actually benefitted, only that the agent intended it would be.

If you find that the agent was acting within the scope of his employment, the fact that the agent's act was illegal, contrary to his employer's instructions, or against the

management of the ship), formerly codified at 46 U.S.C. § 1304, now at 46 U.S.C. § 30701 Note (2006).

49. See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493-94 (1909); WAYNE R. LAFAVE, *CRIMINAL LAW* (4th ed. 2003) §§ 13.4-13.5.

50. 555 F.3d 303 (2d Cir. 2009).

51. *United States v. Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 325 (D. Conn. 2007).

corporation's policies will not necessarily relieve the corporation of responsibility for the agent's act. You may consider whether the agent disobeyed instructions or violated company policy in determining whether the agent intended to benefit the corporation, and/or was acting within his authority.

In determining whether an agent was acting for the benefit of the corporation, you are instructed that the Government need not prove that the agent was only concerned with benefitting the corporation. It is sufficient if one of the agent's purposes was to benefit the corporation.

The Second Circuit upheld the conviction of *Ionia Management* and the \$4.9 million fine imposed below for a MARPOL oil record book violation.⁵² Assuming the Second Circuit's decision in *Ionia Management* was correctly decided and that the court's reasoning can be extended from MARPOL violations to CWA violations, the prosecution against Fleet could have proceeded under a direct liability or vicarious liability theory or some combination of the two. Federal prosecutors have a good deal of discretion in such matters. Relevant guidance to U.S. Attorneys provides, *inter alia*, that

in conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target . . . the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management.⁵³

52. Oil record books are required by Regulation 17 of Annex I to the MARPOL convention. Int'l Convention for the Prevention of Pollution of the Sea by Vessels [MARPOL], Nov. 2, 1973, T.I.A.S. No. 10561, 1340 U.N.T.S. 184, 12 I.L.M. 1319 (1973), as amended by 1978 Tanker Safety and Pollution Prevention Protocol, June 1, 1978, 1340 U.N.T.S. 61, 17 I.L.M. 546 (1978). MARPOL violations are enforced in the U.S. through the Act to Prevent Pollution from Ships, 33 U.S.C. § 1908 (2006).

53. See Dep't of Justice, U.S. Attorney's Manual: Principles of Federal Prosecution of Business Organizations, § 9-28.300(A)(2) (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm. Charging decisions are generally made in consultation with the Environmental Crimes Section of the Environment and Natural Resources Division of the Department of Justice.

The Manual goes on to say, “it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee.”⁵⁴ In short, DOJ is more likely to prosecute where there is evidence of direct corporate criminal liability. Before examining the direct liability theory, the article will briefly examine vicarious liability.

IV. ESTABLISHING CORPORATE VICARIOUS CRIMINAL LIABILITY

Corporate criminal liability may be found under the vicarious liability theory where the offense was committed by an employee or agent of the corporation, each of the acts was done within the course and scope of employment or agency and the employee or agent committed each of the essential elements of the offense with the intent to benefit the corporation. Most tortious acts by a vessel’s master and crew in the operation of the vessel will therefore give rise to vicarious liability claims against the vessel owner or operator who employs them.⁵⁵ Under U.S. law, however, a shipowner may be held vicariously liable for the negligence of a voluntary pilot, but not a compulsory pilot.⁵⁶ Where the underlying “offense” is the negligent discharge of oil in violation of the CWA, the question arises regarding what degree of negligence by the employee or agent is required. This issue is addressed in section III.A below.

Two excellent, although somewhat dated, guides are available to assist attorneys (and their experts) in developing evidence for collision and allision cases.⁵⁷ Those guides will be equally useful in developing or defending against criminal negligence charges based on vicarious liability theory. To the

54. *Id.* § 9-28.500(A). The prosecutor is also directed to consider collateral consequences of a conviction. *See id.* at § 9-28.1000. Collateral consequences are discussed *supra* notes 9-13 and accompanying text.

55. Torts by the vessel master and crew may also give rise to a maritime lien on the vessel.

56. *See, e.g.,* *Homer Ramsdell Transp. Co. v. La Compagnie Generale Tansatlantique*, 182 U.S. 406, 415 (1901) (holding that the owner is not vicariously liable for compulsory pilot’s negligence). *See also* *The China*, 74 U.S. 53 (1868) (holding a ship is liable *in rem* for compulsory pilot’s negligence).

57. *See, e.g.,* JOHN F. MEADOWS, PREPARING A SHIP COLLISION CASE FOR TRIAL, 17 *Am. Jur. Trials* § 501 (1970) (Updated Apr. 2011); JOHN F. MEADOWS & DAVID F. SEARS, SHIP COLLISION: TECHNICAL AND LEGAL ASPECTS; INVESTIGATION AND PREPARATION FOR SUIT, 63 *Am Jur. Trials* § 347 (1997).

author's knowledge, however, no such guidance is available that specifically addresses discovery and evidentiary issues relevant to a direct criminal liability charge for a negligent discharge of oil in violation of the CWA. Section IV of the article is intended to fill that need.

A. CRIMINAL CULPABILITY STANDARD

As a general rule, the standard for establishing negligence to support a criminal conviction is higher than the standard applied in civil tort. For example, the Model Penal Code provides that

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and justifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.⁵⁸

The *mens rea* element of a crime may of course be prescribed by the legislature. However, congress did not define the term "negligence" for purposes of applying the new OPA 90 criminal penalties. In 1999, the U.S. Court of Appeals for the Ninth Circuit, in *United States v. Hanousek*, rejected the more exacting standard under the Model Penal Code and held instead that conviction for a negligent discharge under the Clean Water Act required only proof of ordinary negligence with respect to the elements of the crime.⁵⁹ Ordinary negligence is established by

58. Model Penal Code § 2.02(d) (1962). The July 2005 Council of Europe Directive similarly adopts a heightened standard of negligence, calling for criminal penalties in cases involving "serious" negligence or intentional or reckless conduct. See Olagunju G. Anthony, *Criminalization of Seafarers for Accidental Discharge of Oil: Is there Justification in International Law for Criminal Sanction for Negligent or Accidental Pollution of the Sea?*, 37 J. MAR. L. & COM. 219, 224 (2006) (citing Article 4 of the Directive).

59. *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999) (upholding jury instruction that charged failure to exercise reasonable care under the circumstances is sufficient to establish negligent discharge), *cert. denied*, 528 U.S. 1102 (2000). Accord *United States v. Ortiz*, 427 F.3d 1278, 1282 (10th Cir. 2005) (citing *Hanousek* and holding no heightened level of mens rea for negligent discharge). See also Michael G. Chalos & Wayne A. Parker, *The Criminalization of Maritime Accidents and MARPOL Violations in the United States*, 23 U.S.F. MAR. L.J. 206 (2010-2011); Samara Johnston, *Is Ordinary Negligence Enough to be Criminal? Reconciling*

evidence that the defendant breached a duty to exercise reasonable care and that the breach was a proximate cause of the injury suffered. Accordingly, this section of the article identifies some of the sources of the duty that would be applicable in a charge of a negligent discharge of oil from a vessel in violation of the CWA.

B. THE BASES FOR THE APPLICABLE STANDARD OF CARE

As U.S. District Judge Holland made clear early on in the *Exxon Valdez* oil spill litigation, oil spills in U.S. navigable waters constitute a “maritime” tort within the federal admiralty and maritime jurisdiction.⁶⁰ Accordingly, we look to admiralty’s choice of law rules in determining the sources of law establishing the standard of care applicable to an oil spill in the navigable waters of the United States.⁶¹

The gravamen of a charge of negligent discharge of oil is the defendant’s breach of the duty to exercise reasonable care to prevent such a discharge, where that breach was a proximate cause of the discharge. Duty is a question of law, reviewable de novo on appeal.⁶² The applicable standard of care may be established by legislative enactments, administrative regulations or prior judicial decisions.⁶³ Additionally, industry custom may be taken into account in determining the standard of care.⁶⁴ In the absence of a specific statutory duty, the duty owed is one of reasonable care under the circumstances.⁶⁵ The sources for the standard of care applicable to the master and crew of the *Cosco Busan* (for whom the owner or operator might be vicariously liable) included the general maritime law, along with several

United States v. Hanousek with the Liability Limitation Provisions of the Oil Pollution Act of 1990, 12 U.S.F. MAR. L.J. 263 (1999-2000).

60. The *Exxon Valdez*, 1991 AMC 1482 (D. Alaska 1991). See also *United States v. Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981); *In re Oil Spill by Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992).

61. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) (maritime law, not common law, governs torts within admiralty jurisdiction).

62. *United States v. Paducah Towing Co.*, 692 F.2d 412, 422 (6th Cir. 1982).

63. In maritime law, breach of a duty imposed by statute is referred to as “statutory fault.” See *Union Oil Co. of Calif. v. The San Jacinto*, 409 U.S. 140 (1972) (citing *The Pennsylvania*, 19 Wall. 125 (1874)). See also RESTATEMENT (SECOND) OF TORTS § 285 (1965) (how standard of conduct is determined).

64. RESTATEMENT (THIRD) OF TORTS § 13 (2010); RESTATEMENT (SECOND) OF TORTS § 295A (1965).

65. See *Weyerhaeuser Co. v. The Atropos Island*, 777 F.2d 1344, 1348 (9th Cir. 1985).

laws and regulations, including most prominently the U.S. Navigation Safety Regulations and the Inland Navigation Rules (often called the Collision Regulations).

Regardless of the degree of negligence required by the particular statute, proof of causation is a necessary element of criminal negligence. In cases alleging a negligent discharge of oil in violation of the CWA the government must prove beyond a reasonable doubt that the defendant's negligence caused the discharge. Where, for example, oil is discharged as a result of a vessel's allision with a bridge structure, any negligent act or omission that was a cause of that allision would be relevant to the criminal charge, while non-causative fault would not.⁶⁶ Whether causation might be provisionally established by an applicable presumption is addressed in the next section.

1. PRESUMPTIONS UNDER GENERAL MARITIME LAW

Maritime law has several well-established presumptions that would apply in civil admiralty suits arising out of incidents like the *Cosco Busan* allision. For example, in 1895 the U.S. Supreme Court established a presumption of fault on the part of a ship that runs aground or allides with a fixed object.⁶⁷ Additionally, where a vessel is found to have violated a statute or regulation designed to promote safety of navigation (such as the Inland Navigation Rules or the U.S. Navigation Safety Regulations) there is a presumption that the violation was a cause of the casualty.⁶⁸ Admiralty has also adopted the *res ipsa loquitur* rule.⁶⁹ Although such presumptions or burden-shifting rules might not be appropriate in a criminal case, where the defendant is presumed innocent, an expert witness might be able to cite and rely on these presumptions in forming an opinion for later testimony in a prosecution, particularly where, in the expert's opinion, the presumptions have a substantial empirical basis.⁷⁰

66. Proof of proximate causation is also required to break the responsible party's liability limits under the Oil Pollution Act of 1990. See 33 U.S.C. § 2704(c)(1) (2006).

67. *The Oregon*, 158 U.S. 186 (1895).

68. *The Pennsylvania*, 86 U.S. 125 (1873).

69. *Lone Star Indus., Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453 (8th Cir. 1991); *1st Bank Southeast of Kenosha, Wis. v. M/V Kanlindas*, 670 F. Supp. 1421 (E.D. Wis. 1987); see also RESTATEMENT (THIRD) OF TORTS § 17 (2010).

70. See FED. R. EVID. 703 (expert may base opinion on otherwise inadmissible matters "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences"). FED. R. EVID. 803(18) establishes an exception to the hearsay rule for so-called "learned treatises" relied upon by the expert in direct

2. DUTIES UNDER GENERAL MARITIME LAW

Notwithstanding the teachings of *Erie Railroad Co. v. Tompkins*,⁷¹ federal courts exercising their admiralty jurisdiction play a continuing role in “making” federal law.⁷² Given the relative paucity of statutory sources, this body of judge-made “general maritime law” continues to play an indispensable role in defining and developing the standard of care in maritime torts. For example, the often-quoted “Learned Hand formula” for negligence arose out of an admiralty case.⁷³ Similarly, Judge Hand’s well-known decision on the role of “customary practice” in determining the relevant standard of care arose out of an admiralty case.⁷⁴

3. DUTIES UNDER THE U.S. NAVIGATION SAFETY REGULATIONS

Admiralty courts also look to violations of applicable statutes and regulations as evidence of the standard of care (similarly, federal courts in the *M/V Summit Venture* bridge allision case cited below looked to *international* standards).⁷⁵ For example, in *Western Pacific Fisheries v. S.S. President Grant*,⁷⁶ a case concerning a collision between a fog-bound container ship and a fishing vessel in San Francisco Bay, the Court of Appeals for the Ninth Circuit considered the container ship’s violation of the federal Navigation Safety Regulations⁷⁷ in its determination of

examination or called to the attention of the expert on cross examination, if established as “reliable” by the testifying expert, another expert, or by judicial notice. FED. R. EVID. 803(18). Some of the treatises that might be relevant in a collision or allision case are cited in this article.

71. 304 U.S. 64 (1938).

72. See generally Joel Goldstein, Ernest young, Robert Force & Steven Friedell, *Admiralty Symposium, Federal Common Law in Admiralty*, 43 ST. LOUIS U. L.J. 1337 (1999).

73. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (setting out the $B < P \times L$ framework).

74. See *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

75. RESTATEMENT (THIRD) OF TORTS § 14 (2010) provides that “An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.” The “accident” in this case being an unintentional discharge of oil into the waters of the U.S., international and national measures intended to enhance port and vessel safety are plainly intended to prevent that sort of harm. See also RESTATEMENT (SECOND) OF TORTS § 286 (1965) (when standard of conduct defined by legislation or regulation will be adopted).

76. 730 F.2d 1280 (9th Cir. 1984).

77. 33 C.F.R. § 164 (2011).

fault. Additionally, courts often look to the applicable Inland Navigation Rules⁷⁸ establishing requirements for a look-out, the use of radar and other devices, risk assessment practices and the need to proceed at a safe speed.

The detailed Navigation Safety Regulations (NSRs) requirements for “navigation under way” by vessels of 1600 or more tons operating on U.S. waters apply to the “owner, master or person in charge” of each vessel underway.⁷⁹ As the Ninth Circuit held in *Western Pacific Fisheries*, violation of the NSRs constitutes statutory fault, which is akin to negligence *per se*.⁸⁰

The NSRs require, among other things, that the vessel’s wheelhouse be constantly manned by persons who fix the vessel’s position, plot that position on a chart (rejecting a passive “watch-the-TV monitor” approach to navigation), inform the person directing the movement of the vessel of the vessel’s position and provide certain ship maneuvering information to the pilot. Fixes are to be obtained using “electronic and other navigational equipment, external fixed aids to navigation, geographic reference points, and hydrographic contours.”⁸¹ In addition, the NSRs include detailed criteria for determining safe speed.⁸² Applying the NSRs “safe speed” criteria to the *Cosco Busan* allision, it is difficult to believe that even half ahead, which was 13 knots, according to the vessel’s Pilot Card,⁸³ was a safe speed

78. The U.S. Inland Rules at the time of this case, 33 U.S.C. §§ 2001-2037. The Inland Rules were later transferred from the U.S. Code to the Code of Federal Regulations. See 33 C.F.R. pt. 83 (2011).

79. 33 C.F.R. § 164.11 (2011). The language raises a question whether the NSRs apply *ex proprio vigore* to Fleet, as an operator, or are simply evidence of the standard of care for operating covered vessels in U.S. waters and therefore serve as one of the many legal requirements which Fleet had an obligation to ensure its vessel complied with. In the state of Washington, the pilotage regulations make it clear that the obligation to comply with the NSRs rests with the vessel. Washington pilots are required to obtain assurance from the vessel master that the vessel complies with the NSRs before piloting the vessel. Wash. Admin. Code §§ 363-116-200 to 2051.

80. It is also worth noting that such violations might result in an owner losing the applicable limitation of liability for the resulting oil spill under the Oil Pollution Act of 1990. See *supra* note 10.

81. 33 C.F.R. § 164.11(d) (2011). Navigation near the Delta-Echo span of the Bay Bridge is facilitated by both a Racon marking the center of the span and radar reflector-equipped buoys at either end of Delta tower, proper use of which would have improved the bridge team’s situational awareness.

82. See 33 C.F.R. § 164.11(p) (2011).

83. Those speeds were calculated by converting the RPM figures from the engine bell log print out covering the period immediately preceding the allision to the speed-RPM figures in the Pilot Card the vessel provided to the pilot.

under the circumstances. Moreover, there is virtually no possibility that it was “safe” to come up to full speed, or 17 knots, in those fateful three minutes before alliding with the bridge, given the poor visibility, position uncertainty and loss of situational awareness.

The NSRs complement standards regarding the master-pilot relationship prescribed by the STCW Code and the related IMO resolution, requiring, as they do, the crew to take and plot fixes and to notify the person directing the movement of the vessel of the results. The *Cosco Busan* bridge team appears to have violated those NSRs requirements. For example, the third mate apparently failed to report to the pilot that the vessel was 200 yards left of its intended track at 0820.⁸⁴ If true, that omission would likely have contributed to the pilot’s position uncertainty.

4. DUTIES UNDER THE INLAND NAVIGATION RULES

A vessel’s violation of the applicable Inland Navigation Rules, or International Collision Regulations, is perhaps the most commonly cited basis for finding fault in vessel collision cases.⁸⁵ Relevant rules in the case of the *Cosco Busan* might include Rules 5 (look-out), 6 (safe speed), 7 (risk of collision), 8 (action to avoid collision, particularly 8(e)) and 19 (conduct in restricted visibility). Because a number of treatises extensively examine those rules and the cases interpreting them, they will not be examined here.⁸⁶

84. See U.S. Coast Guard Report, *supra* note 24, at 30 (Finding #10).

85. Some courts decline to invoke the rules of the road or the “*Pennsylvania* rule” in cases not involving collisions. See, e.g., *Southard v. Lester*, 2008 AMC 1467 (4th Cir. 2008) (“specifically, we hold that the International Regulations and the *Pennsylvania* Rule are inapplicable in this case because [the vessel] was not involved in a collision”). But see *Cliffs-Neddrill Turnkey International-Oranjestad, Neddrill 2 B.V. v. M/T Rich Duke*, 1991 AMC 1232 (D. Del.1991); *Davis v. Superior Oil Co.*, 510 F. Supp. 1162, 1166 (E.D. La. 1981). In dicta, the Ninth Circuit suggested that the rule should not be applied “beyond its traditional domain of ship collisions and navigational accidents”; however, even that test would embrace allision cases. See *MacDonald v. Kahikolu, Ltd.*, 581 F.3d 970, 975 (9th Cir. 2010).

86. See generally CRAIG H. ALLEN, *FARWELL’S NAUTICAL RULES OF THE ROAD* (8th ed. 2005); A. NORMAN COCKCROFT & J. N. F. LAMEIJER, *A GUIDE TO THE COLLISION AVOIDANCE RULES* (6th ed. 2004); SIMON GAULT, *MARSDEN ON COLLISIONS AT SEA* (2003) (vol. 4 of *British Shipping Laws*); NICHOLAS J. HEALY & JOSEPH C. SWEENEY, *THE LAW OF MARINE COLLISION* (1998).

V. ESTABLISHING DIRECT CORPORATE CRIMINAL LIABILITY

To restate the criminal liability paths somewhat differently than in the previous section, there are two distinct theories for imposing corporate criminal liability: identification and imputation.⁸⁷ The claim of liability under identification is that the acts of certain individuals should be treated as the actual acts of the corporation. Those acts establish direct liability of the corporation. Thus, a corporate shipowner or operator may be held criminally liable under the direct liability theory where a corporation officer or “high-level” manager commits a negligent act or omission. By contrast, imputation refers to acts by lower-level employees or agents of the corporation, for which the corporation bears only vicarious liability under the principle of *respondeat superior*. Vicarious liability was examined in the previous section.

A corporate shipowner or operator may be held criminally liable under the direct liability theory where the corporation was negligent in selecting, supervising, or otherwise controlling its agents or employees or in carrying out a duty legally assigned directly to the owner or operator.⁸⁸ In announcing the plea agreement in the *Cosco Busan* prosecution, Department of Justice spokesmen plainly signaled their commitment to hold vessel owners and operators to their non-delegable duties. There are sound reasons for doing so, either alone or in conjunction with a vicarious liability theory. Some also find the directly liability theory more compelling, particularly with regard to charging and sentencing.⁸⁹

87. James Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L. J. 73 (1976).

88. RESTATEMENT (THIRD) OF AGENCY § 7.03(1)(b) (2006). An allegation of negligence in hiring arguably opens the door to proof of the employee’s character for safety, provable by specific instances of conduct. See FED. R. EVID. 404, 405.

89. The “culpability” provisions of the Federal Sentencing Guidelines Manual applicable to organizations increases the culpability score, and therefore, the potential sentence, where high-level personnel participated in, condoned, or were willfully ignorant of the offense. See 2010 Federal Sentencing Manual § 8C2.5. See also Manual for U.S. Attorneys, *supra* note 53 (high level participation is a factor in charging).

A. ACTORS WHOSE CONDUCT IS IDENTIFIED WITH THE CORPORATION

At the outset, it is important in the modern multi-layered ship management and operation environment to correctly identify the relevant entity is assessing corporate responsibility. For example, both the STCW and ISM Codes impose certain duties on the relevant "company." The duties set out in those conventions and codes are binding on the "company," who may or may not be the vessel's owner or charterer. Generally, the certificates issued to the vessel will identify the relevant "company," to whom the duties under the two conventions and codes will apply.

The distinction between high-level managers, for whom the corporation bears direct liability, and lower-level employees, for whom the corporation may be vicariously liable, is easier to state than to apply. The Model Penal Code defines a "high managerial agent" in terms of his or her policymaking power:

"high managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.⁹⁰

By contrast, the Restatement (Third) of Agency concludes, "there is no rigid test to determine whether an agent is a 'managerial agent.'"⁹¹

Useful guidance on the distinction is available in state law. Under Texas law, for example, those whose actions create direct liability in the corporation (i.e., the master) include: (a) corporate officers; (b) those who have authority to employ, direct and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and

90. Model Penal Code § 2.07(4)(c) (1962).

91. RESTATEMENT (THIRD) OF AGENCY § 7.03, cmt. e, (2006):

the determination should focus on the agent's discretion to make decisions that would have prevented the injury to the plaintiff or that determine policies of the organization relevant to the risk that resulted in the injury. The title that an agent holds is not dispositive, nor is the fact that the agent is not among the highest in an organization's hierarchy. If an agent in fact manages a business or enterprise, the agent is a "managerial agent" of the principal on whose behalf it manages, although the agent is external to the principal's own organizational structure.

(d) those to whom a corporation has confided the management of the whole or a department or division of its business.⁹² Although mindful of the admonition that it is the persons' function, not title, that determines whether they fall within the high level management class,⁹³ the Texas rule would most likely include "superintendents" sent out by a ship management company's headquarters office to supervise a newly acquired vessel's transition, as was the case with the *Cosco Busan*.

B. CULPABILITY STANDARD

The culpability standard for proof of a negligent discharge of oil under the CWA is the so-called "simple negligence" standard, whether the government relies on a theory of corporate vicarious liability for negligence by its agents or employees or direct corporate negligence. As with land-based torts, maritime law holds that the reasonably perceived risk defines the duty to be obeyed.⁹⁴ Said another way, the standard of care must be adapted to the circumstances, and risk management measures must be commensurate with the risk assessment. That risk is managed through a "layered approach," in which a number of, oftentimes, redundant risk management measures are put in place. The concept is sometimes visually depicted using layers of Swiss cheese: a risk vector must find and penetrate a "hole" in *all* of the layers before it can strike its target. As the risk increases, additional layers are erected to prevent its actualization. Some of those layers plainly fall within the domain of the ship owner or operator, who must exercise reasonable care, at the systemic or managerial level, to address foreseeable risks created by the vessel's operations.

C. THE BASES FOR THE APPLICABLE STANDARD OF CARE

The sources for the standard of care in the *Cosco Busan* case included the STCW Convention and Code, the SOLAS Convention

92. *Corporate Wings, Inc. v. King*, 767 S.W. 2d 485, 488 (Tex. App. 1989).

93. See RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. e, (2006) (the title that an agent holds is not dispositive, nor is the fact that the agent is not among the highest in an organization's hierarchy).

94. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (NY 1928). The standard of care required of professional mariners is governed not by the general standard, but rather by the RESTATEMENT (THIRD) OF TORTS § 12 (2010) standard for "professionals." See Craig H. Allen, *Preventing Merchant Vessel Groundings by Enforcing a Professional Mariner Standard of Care*, 63 WASH. L. REV. 371 (1989) (based on RESTATEMENT (SECOND) OF TORTS § 299A).

and the ISM Code, along with the customary practice of the shipping industry in implementing the STCW and ISM Codes. Under those sources, corporate shipowner negligence (or ship “operator” negligence where responsibility is delegated to an operating company),⁹⁵ as distinguished from negligent operation by the vessel’s master, crew or pilot, may be found, *inter alia*, in a breach of the owner’s duty to exercise reasonable care in: (1) establishing an adequate company policy on safety and environmental protection and navigation practices; (2) hiring a competent master, officers and crew; (3) providing professional training to the master, officers and crew, including training in the company’s safety and environmental protection policy and navigation practices; (4) taking reasonable steps, through inspections, audits, interviews and reviews of logs and records, to determine whether the master, officers and crew are complying with applicable legal requirements and relevant company policies and navigation practices; or (5) ordering timely remedial action where the owner or operator knows, has reason to know, or should have known that the master, officers or crew do not understand or are not complying with the applicable rules, policies and practices.

An important source of federal law that may be relevant to a determination of the vessel owner’s and operator’s duties may be found in the cases adjudicating ship owners’ and charterers’ right to limit liability under U.S. law. The governing federal statute generally provides a right to limitation where the negligent conduct causing the harm occurred without the “privity or knowledge” of the vessel owner or charterer.⁹⁶ In effect, a vessel owner might be able to limit its liability under the *respondeat superior* theory, but it cannot do so for its own *direct* negligence.⁹⁷ The parallels between proving a shipowner’s privity or knowledge in limitation actions on the civil-admiralty side and proving an owner’s or operator’s direct liability in a criminal case should be immediately apparent.⁹⁸ For example, under the “active control”

95. See JAMES J. BUCKLEY, *THE BUSINESS OF SHIPPING* ch. 10 (8th ed. 2008).

96. See 46 U.S.C. § 30505(b) (2006).

97. See *Richardson v. Harmon*, 222 U.S. 96 (1911) (owner may not avoid liability for its own fault or neglect).

98. Like all analogies, the analogy between the privity or knowledge determination and the direct criminal liability determination must be used with caution. Limitation actions entail two steps. In the first one, the court determines whether someone for whom the owner or charterer bears vicarious liability committed actionable fault. If so, the court in the second step determines whether

cases involving limitation of liability claims, if an owner or a managing agent of the owner is in active control of the vessel at the time the claim arises, privity or knowledge is established.⁹⁹

The cases applying the limitation of liability statute, distinguishing as they do “negligence on the bridge” from “negligence in the home office,” are an important reference point in understanding the distinct obligations of a ship owner.¹⁰⁰ For example, following the M/V *Summit Venture*’s 1980 allision with the Sunshine Skyway Bridge in Tampa Bay, Florida, resulting in thirty-five deaths, the federal district court was faced with the shipowner’s petition to limit its liability under the above cited statute.¹⁰¹ The trial court denied limitation after finding that the owner had failed to adequately train the vessel’s master and crew in their responsibilities when a harbor pilot was employed, a relationship defined at the time by a precursor to the STCW Code cited in Section IV.B of this article.¹⁰² A similar limitation action arose in 2002 when the towboat *Robert Y. Love* allided with the Interstate 40 bridge over the Arkansas River near Webber Falls, Oklahoma, killing fourteen motorists.¹⁰³

Another important decision that defines the ship owner’s or operator’s independent legal obligation regarding safe navigation of its vessel arises out of a 1965 British case involving the vessel *Lady Gwendolen*. The vessel was employed by the Guinness brewing company to transport fresh ale from Dublin to Liverpool.

that causative fault was within the owner’s or charterer’s privity or knowledge. *See, e.g., Hercules Carriers, Inc. v. Claimant, State of Florida (The Summit Venture)*, 768 F.2d 1558 (11th Cir. 1985). For the corporate shipowner, privity or knowledge of the corporation is deemed established if a managing agent, officer or supervising employee had privity or knowledge. *See, e.g., Brunet v. United Gas Pipeline*, 15 F.3d 500 (5th Cir. 1994); *Verdin v. C&B Boat Co., Inc.* 860 F.2d 150 (5th Cir. 1988). By statute, the master’s privity or knowledge is imputed to the owner in cases of personal injury or death, but not for property losses. 46 U.S.C. § 30506(e) (2006).

99. *See, e.g., Complaint of Ingoglia*, 723 F. Supp. 512 (C.D. Cal. 1989).

100. The distinction is sometimes expressed in terms of strategic negligence (ship owner’s or operator’s policies, practices, procedures, hiring, training, auditing performance, and corrective action), operational negligence (operating manuals, watch, quarter and station bills used on board vessel, voyage planning), and tactical negligence in particular cases (means of taking/plotting fixes, a decision to continue toward bridge even after losing situational awareness).

101. *In re Hercules Carriers*, 566 F. Supp. 962 (M.D. Fl. 1983). The court also held that the M/V *Summit Venture* was unseaworthy because the master and crew were not adequately trained.

102. *Id.* at 979-82.

103. *In re Magnolia Marine Transp. Co.*, 301 F. Supp.2d 1283 (E.D. Ok. 2003).

On one such trip the vessel collided with an anchored vessel in heavy fog on the River Mersey while operating at full speed. The court denied the shipowner's petition for limitation of liability after finding that the owner knew or should have known, by inspecting the ship's logs, that the vessel often operated at an excessive speed in fog; and yet, the owner did nothing to correct the practice.¹⁰⁴ More recently, a British court denied a vessel owner limitation based on the owner's fault in failing to instruct and train the master and crew and for inadequate manuals.¹⁰⁵ Similarly, the Fifth Circuit denied limitation to the owner of a ship that collided with another vessel in fog on the Mississippi River despite, or perhaps because of, the owner's assertion that it preferred a "hands off" management approach to its vessel.¹⁰⁶ Although these cases concern statutory limitation of liability, they ultimately deal with the question of independent fault by the vessel's management and are, therefore, an important source of the evolving standard of care applicable to vessel owners and operators.

1. DUTIES UNDER THE INLAND NAVIGATION RULES

Possible violations of the Inland Navigation Rules by those on board the *Cosco Busan* were identified in Section III.B.4. Violations by the vessel master or crew, but not the pilot, may give rise to vicarious, but not direct liability. The violations may, however, be relevant to their competency, and therefore to the vessel operator's care in selecting them, or to their level of and need for training.

In a decision subject to some doubt in the modern era, one court held that a vessel owner owes no duty to instruct

104. *The Lady Gwendolen*, [1965] 1 Lloyd's Rep. 335 (C.A.). Captain Robert Slack reports that in that case the shipowner offered in its defense a "thick file of letters" its marine superintendent had sent to the master admonishing him about his excessive speed in fog. Writing for the court, Justice Hewson, who commanded destroyers in World War II, responded that the owner could not avoid liability by "a spate of letters which are often filed and forgotten." Robert Slack, *The Seaman's Eye* (presented to the 39th annual meeting of the Institute of Navigation, June 1983) (copy on file with the author). See also *Spencer Kellogg & Sons, Inc. v. Hicks (The Linseed King)*, 285 U.S. 502 (1932) (mere instructions to subordinate employees to comply with company safety directives is not enough to shield owner from liability).

105. *The Eurasian Dream*, [2002] 1 Lloyd's Rep. 719 (Q.B. Div.).

106. *In re Trico Marine Op., Inc.*, 332 F.3d 779 (5th Cir. 2003); *Coryell v. Phipps (The Seminole)*, 317 U.S. 406 (1943) (defining outer limits of owner's delegation options).

professional mariners on the rules of the road.¹⁰⁷ Similarly, another court ruled that failure to train a fishing vessel master on how to properly use electronic navigation equipment does not make the vessel owner fully liable for an allision nor does it prevent the vessel owner from limiting its liability—at least when there is insufficient evidence to prove that such failure to train was the cause of the allision.¹⁰⁸ While both conclusions might be legally justified under their facts, for vessels not subject to the STCW and ISM Codes, even with vessels not governed by the STCW and ISM Codes, the owner *does* have a duty to hire a competent master and crew, and a competent master and crew should not require instruction by the owner on the rules of the road. Additionally, it now seems well established that a vessel owner does have a duty to familiarize new crew members with the vessel's navigation equipment before sending them out to operate the vessel on the public waters.

The principle established by the *Lady Gwendolen* case cited above also makes it clear that an owner or operator may be found negligent under a direct liability theory, and denied limitation of civil liability, where the owner or operator knew or should have known that the vessel master or watch officers violated the rules by, for example, operating at an excessive speed, keeping an inadequate look-out or in not using all means appropriate to determine if risk of collision exists, while taking no corrective action. In some cases, such conduct might even rise to the level of willful blindness, establishing knowledge.¹⁰⁹

2. OPERATOR ("COMPANY") DUTIES UNDER THE STCW CODE

The 1978 Convention on Standards of Training, Certification and Watchstanding of Seafarers (STCW) and its accompanying

107. *Matheny v. Tenn. Valley Auth.*, 557 F.3d 311, 320 (6th Cir. 2009).

108. *In re Omega Protein*, 548 F.3d 361 (5th Cir. 2008). The court found that the vessel was equipped with an electronic chart that had an obstruction warning system. The vessel owner had not provided the master with training in use of the electronic chart system and he had never read the operating manual. Evidence indicated, however, that there were so many offshore rigs in that part of the Gulf of Mexico that the master would not have received an effective warning of the obstruction even if he had known how to properly use the navigation equipment.

109. Evidence that the defendant acted with willful blindness, conscious avoidance or deliberate ignorance—which means the defendant deliberately closed his eyes to what otherwise would have been obvious—can be used to prove knowledge, not merely negligence. See *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011).

Code,¹¹⁰ which evolved from an earlier IMO resolution, entered into force in 1984. The 1978 Convention and Code were amended in 1995 and again in 2010.¹¹¹ The United States is a party to the Convention and its Code.¹¹² In the U.S., STCW applies to mariners employed on vessels greater than 200 gross register tons (domestic tonnage), or 500 gross tons (International Tonnage Convention tonnage), operating seaward of the boundary lines.¹¹³ Significantly, the STCW Convention imposes specific obligations on the “company,”¹¹⁴ which is defined as the “owner of the ship or any organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all the duties and responsibilities imposed on the company by these regulations.”¹¹⁵ The STCW Convention, thus, permits the owner to delegate responsibility, but does not envision that it can be further delegated beyond the operator.¹¹⁶

STCW Convention Regulation I/14 sets out the “responsibilities of companies” under the STCW Code. The STCW Code is, in turn, divided into two parts. Part A contains mandatory provisions, while Part B consists of “recommended” guidance, which includes recommendations on Bridge Resource

110. Convention on Standards of Training, Certification and Watchstanding of Seafarers [STCW], Dec. 1, 1978, 1361 U.N.T.S. 190.

111. See 1995 Amendments to the Annex of the Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, Jul. 7, 1995, Sen. Exec. Doc. EE 96-1, C.T.I.A. No. 7624. The convention was again substantially amended in 2010. These “Manila” amendments became effective Jan. 1, 2012); however, those amendments post-date the *Cosco Busan* incident. For a summary of the 2010 Manila Amendments see <http://www.uscg.mil/nmc/announcements/brochure/stcw.pdf>.

112. See also U.S. Coast Guard, Navigation and Vessel Inspection Circular No. 4-97, Guidance on Company Rules and Responsibilities under the 1995 Amendments to the International Convention on Standards of Training, Certification and Watchkeeping (STCW), COMDTPUB P16700.4 (1997), available at <http://www.uscg.mil/hq/cg5/nvic/pdf/1997/n4-97.pdf>. Implementing federal regulations were codified at 46 C.F.R. §§ 15.1101 – .1111 (2011).

113. 46 C.F.R. § 15.1101 (2011). The “boundary lines” are prescribed in 46 C.F.R. pt. 7. Vessels operating seaward of those lines are deemed “seagoing” vessels.

114. See, e.g., STCW Convention, *supra* note 110, Reg. 1/14.

115. *Id.* at Reg. I/1.23.

116. The question whether an owner may also be found guilty on a “negligent entrustment” theory for delegating management responsibility to an incompetent company is beyond the scope of this article.

Management.¹¹⁷ The mandatory provisions of the STCW Code require the company to, *inter alia*, ensure that the obligations set out in Section A of the Code are given full and complete effect, and to provide written instructions to the master setting forth the policies and procedures to be followed.¹¹⁸

Chapter VIII of the STCW Code sets out the standards regarding watchkeeping. These watchkeeping practices overlap with, but are distinct from, the U.S. Navigation Safety Regulations cited above. The Code includes requirements regarding passage planning, principles to be observed in keeping a navigational watch, performance of the navigational watch, watchkeeping in restricted visibility and in congested waters and navigation with a pilot on board. The Convention and its Code were originally adopted in 1978, giving ship owners and operators more than thirty years to incorporate the STCW architecture into their fleet navigation policies, manuals, standard operating procedures and training programs.

Early federal decisions, including at least one by the U.S. Supreme Court, described an embarked pilot as the “temporary master” of the piloted vessel and set strict limits on the master’s power to override the pilot’s decisions.¹¹⁹ Those early cases have been superseded in part by U.S. accession to the STCW Convention and Code. The relevance of international standards for watchkeeping now codified in the STCW Code was highlighted in the *M/V Summit Venture* bridge allision case cited above. One of the principles made clear in the STCW Code is the relationship between a vessel’s master and crew and an embarked pilot. Recognizing that a layered safety management approach entails shared navigation responsibility, section A-VIII/2, part 3-1 (paragraphs 49-50) establishes the following rule:

49. Despite the duties and obligations of pilots, their presence on board does not relieve the master or officer in charge of the navigational watch of their duties and

117. The fact that Part B is denominated “recommended guidance” is now misleading in light of ISM Code, para. 1.2.3.2, which requires the company’s safety management system to “ensure” that applicable IMO guidelines are taken into account.

118. STCW Code, *supra* note 110, Section A-1/14.

119. *Cooley v. Bd. Wardens of Philadelphia*, 53 U.S. 299, 316 (1851). *But see* *Ralli v. Troop*, 157 U.S. 386, 402 (1895) (“the master still has the duty of seeing to the safety of the ship”). See generally ALEX J. PARKS & EDWARD V. CATTELL JR., *THE LAW OF TUGS, TOW, AND PILOTAGE* 1003-10 (3d ed. 1994).

obligations for the safety of the ship. The master and pilot shall exchange information regarding navigation procedures, local conditions and the ship's characteristics. The master and/or the officer in charge of the navigational watch shall co-operate closely with the pilot *and maintain an accurate check on the ship's position and movement* (emphasis added).

50. If in any doubt as to the pilot's actions or intentions, the officer in charge of the navigational watch shall seek clarification from the pilot and, if doubt still exists, shall notify the master immediately and take whatever action is necessary before the master arrives.

A 2003 resolution by the IMO reaffirms these principles and adds that "[m]asters and bridge officers have a duty to support the pilot and to ensure that his/her actions are *monitored at all times*."¹²⁰ The rule is grounded on a sound empirical record. Ship owners and operators who dispatch their vessels to ports throughout the world know full well that pilot competency varies greatly from one location to another;¹²¹ and even from one pilot to another within the same port. Shipowners know that vessel navigation and collision avoidance equipment vary by manufacturer and even model, particularly in the location of equipment controls and their displays. Ship owners also know that no one is more familiar with the ship's equipment and operational procedures than the master and crew, and certainly not the pilot, who in some ports compensates for this by bringing a specially equipped laptop computer, sometimes referred to as a "personal pilot unit" or PPV, aboard.¹²²

The pilot is selected for his or her knowledge of the pilotage grounds, not of the vessel, its equipment or crew. If the ship is to

120. IMO, Recommendations on training and certification and operational procedures for maritime pilots other than deep-sea pilots, IMO Resolution A.960(23) (2003), annex 2, para. 2.3 (emphasis added).

121. See JOHN MCPHEE, LOOKING FOR A SHIP 222 (1990) (reporting that the ship's master could "see a courtroom of lawyers" reflected in a nonchalant and inexperienced pilot's eyes).

122. In Puget Sound, for example, roughly twenty percent of the pilots use personal pilot unit (PPU) laptops. Delmar Mackenzie, *After Cosco Busan: A Fresh Look at Safety in Puget Sound*, PACIFIC MARITIME, Aug. 2008, at 30-32. Obviously, a pilot using a PPU will have a different operating picture than the vessel's crew and will likely relate to the bridge team and bridge equipment differently than a pilot not so equipped.

be navigated with precautions appropriate to the prevailing circumstances, the shipowner must ensure the master and crew are fully integrated into, and engaged in, vessel navigation and collision avoidance at all times, even while a pilot is aboard. Therefore, a prudent shipowner prescribes a policy requiring a thorough master-pilot exchange of information: the vessel provides the pilot with, among other things, information on the vessel's maneuvering characteristics, while the pilot provides the owner with what some pilots' associations call a "navigation" plan.¹²³ Any differences between the passage plan prepared by the vessel and the pilot's intended navigation plan, or later changes to the navigation plan, must be reconciled. The master-pilot information exchange is designed to facilitate a shared understanding of the risk factors and risk management considerations. The "exchange" continues throughout the transit over the pilotage grounds. As the vessel's crew maintains its "accurate check" on the vessel's position and movement, it reports its findings to the pilot and to the master.¹²⁴ A shipowner who fails to establish a policy and standard operating procedures requiring such practices is negligent, as is one who fails to ensure compliance with such policies and procedures.

3. OPERATOR ("COMPANY") DUTIES UNDER SOLAS AND THE ISM CODE

SOLAS Regulation V/34 on passage, or voyage, planning, which was added to SOLAS in 2002 and generally incorporates a

123. Elements of the master-pilot exchange are described in IMO Resolution A.960(23) (2003), annex 2, para. 5. The resolution distinguishes between "passage planning" as part of the master-pilot exchange, and the independent requirement for berth-to-berth "voyage planning" under SOLAS Regulation V/34, STCW Code Section A-VIII/2, Part 2 and IMO Resolution A.893(21). A compliant SMS and its related fleet navigation procedures would ensure that ISM-covered vessels complied with these sound and prudent navigation planning practices. Maritime Administrations, such as the UK Marine Accident Investigation Branch, now carefully scrutinize the master-pilot exchange in the course of marine casualty investigations. In addition, the Nautical Institute has published several excellent guides and monographs that might be considered relevant "learned treatises," which accurately collect industry custom or prudent practices, or evidence of "good seamanship" practice under Rule 2 of the Rules of the Road that an expert might rely on in forming an opinion or inference. See, e.g., THE NAUTICAL INSTITUTE ON PILOTAGE AND SHIPHANDLING, 10, 11-13 (1990); THE NAUTICAL INSTITUTE ON COMMAND, 33-39, 114-17, 142-47, 189-93 (2000).

124. See Craig H. Allen, *Fixing Responsibility for Pilot Navigation*, 7 PROF. MARINER 15 (1994) (condemning the failure by vessel officers and crews to meet their NSR and STCW obligations while a pilot is aboard).

1999 IMO resolution, imposes a duty on the master to “ensure that the intended voyage has been planned using the appropriate nautical charts and nautical publications for the area concerned, taking into account the guidelines and recommendations developed by the [IMO].”¹²⁵ The area of “concern” is understood to extend from “berth-to-berth”;¹²⁶ that is, from the point where the vessel gets underway from a pier or anchorage until it arrives at the destination pier or anchorage, and expressly includes “*those areas where the services of a pilot will be used.*”¹²⁷ Passage planning is divided into four stages: appraisal, planning, execution and monitoring.¹²⁸ During the planning stage, the vessel’s navigator plots tracklines and waypoints for the voyage and establishes “the method and frequency of position fixing, including primary and secondary options, and the indication of areas where accuracy of position fixing is critical and maximum reliability must be obtained.” This requirement recognizes that without pre-established tracklines and waypoints, the vessel’s bridge navigation team has no effective means of complying with their obligations to independently verify the vessel’s navigation safety by comparing the vessel’s actual position to the intended track, to determine the time to turn onto a new trackline or to avoid navigational dangers through parallel indexing and danger ranges/bearings. SOLAS Regulation V/34 works hand-in-hand with similar risk assessment and management measures set out in STCW Code section A-VIII/2, part 2 (voyage planning).

Since its entry into force in 1998 as an amendment to the SOLAS Convention, the International Safety Management (ISM) Code formally mandates implementation of a “quality management” systems approach for merchant vessel safety and environmental protection, similar to the more familiar systems under the ISO 9000 and 14000 series of standards.¹²⁹ The ISM

125. SOLAS, *supra* note 26, Reg. V/34.

126. Among the IMO “guidelines and recommendations” that must be taken into account under SOLAS Reg. V/34 are Guidelines for Voyage Planning, IMO Res. A.893(21) (1999). Paragraph 1.3 of that resolution establishes the berth-to-berth scope of the planning process.

127. *Id.* para. 2.2 (emphasis added).

128. IMO Res. A.893(21) *supra* note 126. Resolutions by the International Maritime Organization may constitute part of the “generally accepted international regulations, procedures and practices” flag states must conform to under article 94 of the Law of the Sea Convention. See UNCLOS, *supra* note 20, art. 94(5).

129. The ISM Code was adopted by IMO resolution in 1993. See IMO, International Management Code for the Safe Operation of Ships and for Pollution Prevention [ISM Code], IMO Res. A.741(18) (1993). The ISM Code is set out in the

Code overlaps with industry standards and codes, such as the 60-page Code of Shipmanagement Standards (CSS) promulgated by the International Ship Manager's Association (InterManager),¹³⁰ and which may constitute evidence of the customary practice of the industry to be used in determining the standard of care.¹³¹

The ISM Code imposes specific requirements on both the vessel master¹³² and the "company" that owns or operates covered vessels; however, the U.S. implementing statute substitutes "responsible person" for "company".¹³³ The impetus behind the Code was the finding in a number of marine casualty investigations that too many maritime operators lacked a safety "culture" or "system," and that risk identification, assessment and management must begin with the entity in the best position to create such a culture and safety management system—the vessel owner or operator.¹³⁴ As described earlier, the central pillar of the navigational component of a comprehensive and properly integrated safety management system is a layered defense, with safety responsibilities shared by the owner, operator, master,

Annex to Appendix 1 of the resolution. Amendments to the SOLAS Convention, including adding Chapter IX, were set out in Appendix 2. The ISM Code is implemented in the United States by 46 U.S.C. ch. 32 and 33 C.F.R. pt. 96 (2011). See generally USCG Safety Management System Manual Guidebook, available at www.uscg.mil/pvs/docs/ISM/SMSGuide.doc.

130. InterManager's members subsequently determined that ISO 9001:2000 encompasses the ISMA Code elements, thus obviating a separate industry-specific code. The organization does, however, publish industry-specific interpretations of the ISO standards for its members. See InterManager, *History*, available at <http://www.intermanager.org/about/history/>.

131. RESTATEMENT (THIRD) OF TORTS § 13 (2010). See also Buckley, THE BUSINESS OF SHIPPING, *supra* note 95 (which devotes chapter 10 to a description of the function served by "vessel management companies"). One source of information concerning the practices of ship management companies is the periodical *Lloyd's Ship Manager*.

132. See ISM Code, *supra* note 129, section 5. The company defines and documents the master's responsibility. *Id.* at section 5.1. In discharging his or her obligations under the Code, the master is to coordinate with the company's Designated Person.

133. *Id.* paras. 3-12. As with the STCW Convention and Code, the ISM Code defines the "company" as the "owner of the ship or any organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all the duties and responsibilities imposed by the ISM Code." See SOLAS Reg. IX/1.2. See also 33 C.F.R. § 96.120(a) (2011). The Interim Safety Management Certificate for the *Cosco Busan* listed Fleet as the "company."

134. For a summary of the company's ISM obligations see Craig H. Allen, *The ISM Code and Shipowner Records: Shared Safety Goals vs. Industry's Privacy Needs*, 11 U.S.F.MAR. L. J. 1 (1999).

officers and crew, as well as the pilot when embarked, the vessel's flag state and the port state, which may provide aids to navigation and traffic information and/or control systems. An effective system builds in redundancy, with backup equipment, fixes determined independently by two position fixing methods, etc., to guard against a single point failure. The greater the risk, the more numerous and/or elaborate the protective layers must be. Risk management and loss control experts with vessel classification societies and marine insurers stand ready to assist vessel owners and operators in designing and implementing an effective safety management system.

The ISM Code requires the company to assign a Designated Person (DP, DPA for "Designated Person Ashore"), and prescribes the DPA's duties.¹³⁵ The DPA serves as the conduit between the vessel and the company. The DPA has the responsibility to monitor the safety and pollution prevention aspects of the operation of each ship. The central importance of the DPA in assessing whether a "company" acted negligently cannot be over-emphasized.¹³⁶ "Hands-off" management of merchant vessels is no longer tolerated, nor can an owner turn a convenient blind eye to unsafe practices on its vessel. The ISM Code imposes a duty to inquire. The DPA provides the "link between the company and those on board" and he or she must have "direct access to the highest level of management."¹³⁷

An ISM Code-compliant Safety Management System (SMS) will include provisions for safe navigation (e.g., compliance with the applicable rules of the road, STCW Code and any similar requirements for the specific waters like the U.S. Navigation Safety Regulations, passage planning, responsibilities for navigation, additional risk management measures to be employed in restricted visibility and congested waters, etc.).¹³⁸ A properly

135. ISM Code, *supra* note 129, at para. 4.

136. As Lord Donaldson, author of the pathbreaking 1994 *Safer Ships, Cleaner Seas* report to the UK government following the grounding of, and massive oil spill by, the tanker *Braer*, pointed out shortly after the ISM Code entered into force, with the advent of ISM, there will now often be two levels of inquiry: negligence by those on the ship and negligence on the part of the shipowner in implementing a compliant Safety Management System (i.e., negligence by management that sets the conditions for negligence on the ship). John F. Donaldson, *The ISM Code: the Road to Discovery?*, [1998] LLOYDS MAR. & COM. L. Q. 526-34.

137. ISM Code, *supra* note 129, at para. 4.

138. Such additional measures include a requirement for a detailed berth-to-berth passage plan with pre-established waypoints and decision considerations

trained DPA for the Company, exercising reasonable care in carrying out his or her duties, will inspect the vessel's logs and make appropriate inquiries to ascertain whether the vessel was complying with the company's SMS and other required practices. Failure to establish, implement and verify compliance with the safety management system constitutes a breach of the duty to exercise due care.

VI. THE CASE STUDY: PROVING DIRECT CORPORATE CRIMINAL LIABILITY

Section IV of the article identified ship owner and operator duties that might be relevant in determining criminal liability for a negligently caused discharge of oil under a direct corporate liability theory. This section draws on the *Cosco Busan* accident reports by the NTSB, Coast Guard and Board of Pilot Commissioners, together with the accompanying public documents and press reports (collectively, the "case study"), to demonstrate how those duties might be applied in a particular case. It is again emphasized that this case study draws on agency investigative reports or stipulations by the defendant, as part of the plea agreement, that were never tested at trial. It is also important to keep in mind that the indictment named only Fleet, and the compulsory pilot; so, the vessel's owner, classification society and other entities whose acts or omissions might have contributed to the allision and oil spill are not examined here.¹³⁹ This section will also not attempt an examination of those officers or employees whose conduct would be directly identified with the operator of the *Cosco Busan*. Among those who might represent "management," for whom the vessel's operator (i.e., the company) might bear direct liability, are, of course, directors and officers of

attached to each, a pre-departure navigation brief for the bridge team to review the navigator's track lines, and the use of parallel index lines and/or danger ranges/bearings, as appropriate. See RICHARD A. CAHILL, STRANDINGS AND THEIR CAUSES ch. 12 app.1, ch. 13-14 (2002); ROBERT J. MEURON, WATCHSTANDING GUIDE FOR THE MERCHANT OFFICER 46-57 (1990). They might also include anything from delaying the vessel departure until visibility improves, to setting a slower speed, deploying an enhanced navigation team and maintaining closer than normal coordination with the VTS. Prudent companies might even direct their ship's crew to set up two redundant navigation/collision avoidance teams.

139. Had this case not been disposed of by plea agreement it might have been fruitful to explore the classification society's conduct in issuing the vessel's Safety Management System certificate on October 25, 2007, and the question whether evidence regarding Fleet's competency as a ship management company also raised questions of negligent entrustment of a merchant vessel by the vessel's owner.

the company, but it might also include the company's superintendents who embarked on the vessel¹⁴⁰ and the DPA named in the vessel's Safety Management System. In fact, a persuasive argument might have been made that the presence of two on-board Fleet superintendents for most of the voyage placed the vessel under the "active control" of Fleet during the voyage. The publicly available record was not adequate to assess the actual *function* served by those individuals, as the relevant legal test for determining whether they were a "high managerial agent" would require.

A. FLEET'S SAFETY MANAGEMENT SYSTEM MANUALS WERE DEFICIENT

Fleet prepared several manuals for the *Cosco Busan* that served as the foundation for the company's ISM Code-required Safety Management System (SMS), including a Bridge Procedures Manual and a Shipboard Management Manual.¹⁴¹ Those manuals appeared to adequately reflect the applicable standard of care required in merchant vessel navigation matters; however, the Coast Guard concluded that the SMS fell short in several respects.¹⁴²

The Fleet manuals comprising the vessel's SMS that were available in the public record incorporated many of the policies and practices required by SOLAS and the mandatory STCW and ISM Codes. The manuals also constituted evidence that Fleet and its on-board superintendents had knowledge of those international standards and the duties they assigned to Fleet as the relevant company. Accordingly, the policies and procedures set out in Fleet's manuals would be relevant in assessing whether Fleet breached its duty of due care under the general maritime law. Fleet also had an independent legal obligation under SOLAS and the ISM Code to implement and monitor compliance with its approved SMS. A breach of that obligation might constitute statutory fault, the maritime analogue to negligence *per se*. As

140. One was described as Fleet's "Marine Superintendent" and the second was described as Fleet's "Technical Superintendent."

141. The vessel's SMS was extensively discussed in the NTSB U.S. Coast Guard investigation reports. Selected provisions were also posted on the NTSB's public document web site.

142. See U.S. Coast Guard Report, *supra* note 24, at 31 (concluding that there was evidence that the SMS was "inadequate with respect to bridge management team principles, voyage planning, crew indoctrination, and procedures for navigation in restricted visibility").

the following section will explain, had Fleet exercised reasonable care in implementing and monitoring compliance with its SMS, and those particular provisions governing the vessel's navigation planning and execution, the 2007 allision would likely have been prevented.

B. FLEET'S CONDUCT BREACHED THE STANDARD OF CARE AND ITS OWN SMS

The evidence available in this case would almost certainly have demonstrated that Fleet's conduct, like the conduct of the owners of the M/V *Summit Venture*, fell well short of what would have been "reasonable" under the circumstances and below the now-common practice of merchant vessel operators in establishing safety policies, prescribing navigation practices, ensuring the adequacy of related master and crew-training, and in verifying, through inquiry, inspection and examinations, the vessel's compliance.¹⁴³

In assessing negligence in this case it is important to note that the "risk to be perceived" in sending a ship to a congested port notorious for its frequent fog is not only that which came to pass on that 2007 morning, a glancing blow that nevertheless resulted in a major oil spill in a water body with incalculable environmental, economic and aesthetic value, but rather the sum of *all* risks posed by a 900 foot long vessel with up to two million gallons of fuel oil groping its way through dense fog near one of the most heavily traveled bridges in America. The consequences could have been much worse. Using Judge Hand's deceptively simple calculus, the probability of an allision or other casualty, such as a collision with another vessel, might not be large, but

143. An example of customary industry practice can be found in the recently published company navigation policies and practices for an ECDIS-equipped cruise ship reported in the July 2008 issue of the *Journal of Navigation*, which is published by the Royal Institute of Navigation. See Nick Nash, *A Modern Day Cruise Ship Master's "Captain's Navigation Orders,"* 61 J. NAV. 547-556 (2008) (describing a multi-layered navigational risk management system that, among other things, defines requirements for passage planning with waypoints and the associated decision factors, the subsidiary role of embarked pilots, and the role of all bridge team members in making "go/no go" risk decisions). See also NAUTICAL INSTITUTE, *MANAGING RISK IN SHIPPING: A PRACTICAL GUIDE* (1999) (distinguishing the company's role in managing shipping risks from that of the master and crew); A.J. SWIFT, *BRIDGE TEAM MANAGEMENT* (2d ed. 2004). Since 1997, tanker owners and operators have been required by federal regulation to adopt bridge resource management. Bridge Resource Management Policy and Procedures, 33 C.F.R. § 157.415 (2011). The ISM Code effectively requires non-tankers to do the same.

the magnitude of the potential loss, as demonstrated by the Sunshine Skyway Bridge tragedy, calls for extra-ordinary risk management measures, including the obvious measure to remain safely at the dock, which was the measure apparently chosen by four other ships that faced similar conditions that morning.¹⁴⁴ Ship owners, and the ship owners' SMS, must provide the master and crew with a clear policy and instructions on how such risks are to be assessed and managed, and on when a master in doubt should exercise independent judgment and/or consult with the ship's operator or its DPA.

Had the case gone to trial, the examination of whether Fleet breached the standard of care could have been organized into six areas, including the company's:

- Failure to exercise due care in hiring a competent master and mates,
- Failure to exercise due care in training the *Cosco Busan's* master and mates,
- Failure to exercise due care in implementing the required safety management system,
- Failure to exercise due care in supervising the vessel's navigation planning,
- Failure to exercise due care in assigning sufficient navigation personnel for restricted waters, and
- Failure to exercise due care in supervising execution of navigation plans and procedures.

In examining the available evidence, several facts stand out: (1) the *Cosco Busan* master and all other officers and crew members other than the chief engineer reported aboard the ship in Busan, Korea on October 24, 2007, the day before the vessel got underway for California;¹⁴⁵ (2) the vessel's crew list shows that when the ship sailed for California it carried, in addition to

144. The decision by those vessels is consistent with the guidelines established by the San Francisco, San Pablo and Suisan Bay Harbor Safety Plan [HSP], Section XIV of which provides that "[v]essels within the Bay at a dock . . . shall not commence movement if visibility is less and .5 nautical miles throughout the intended route, unless the operator's assessment of all variables is that the vessel can proceed safely." HSP, *supra*, at 5 and 43, quoted in NTSB Report, *supra* note 22, at 79.

145. NTSB Report, *supra* note 22, at 46.

the master, officers and crew, two company “superintendents” and that at least one of the superintendents did not leave the ship until immediately before it got underway from Oakland on the morning of the allision.¹⁴⁶ The presence of the company’s superintendents on board the vessel provided Fleet with actual or constructive knowledge of the conduct on board the ship and an opportunity—indeed a duty—to take reasonable and timely corrective action, thus converting what might otherwise be a question of vicarious liability of a principal for the conduct of its agents to one of direct liability for a breach of the principal’s/employer’s independent duty to exercise reasonable care in the face of a known risk.¹⁴⁷

1. FAILURE TO EXERCISE DUE CARE IN HIRING A COMPETENT MASTER AND MATES

The available evidence suggests Fleet breached its duty to exercise reasonable care by hiring a master who did not understand his duties as master of a 900 foot cargo vessel under SOLAS, the ISM and STCW Codes, the U.S. Navigation Safety Regulations,¹⁴⁸ or even the company’s own Safety Management System manuals. The master sailed from Busan without a passage plan,¹⁴⁹ an omission that could not have escaped the attention of Fleet’s on-board marine superintendent. It could be inferred from the master’s stated level of deference to the pilot on the morning of the allision and his explanation for why he decided to get underway that morning, despite the dangerous conditions, or to depart Busan despite the complete lack of navigation planning or navigation team training, that rather than select a master who would exercise the kind of independent judgment called for by the governing legal codes, Fleet chose a master who could be counted on to put the company’s business priorities first. The exchange with the pilot over the ECDIS symbols for the bridge span also strongly suggests that either the master did not understand one of the most important features of this critical piece of navigation equipment or did not have a sufficient grasp of English to understand and answer the pilot’s question. Either fact would cast doubt on the master’s

146. See NTSB Interview of Captain Parminder Singh, Nov. 16, 2007, at pp. 8-9, available on the NTSB DMS web site, *supra* note 16.

147. See RESTATEMENT (THIRD) OF AGENCY §§ 7.03(1), 7.05, 7.06 (2006) (liability of principal).

148. See, e.g., SOLAS, *supra* note 26, Regs. V/34, V/34-1 & XI-2/8.

149. This violated STCW Code section A-VIII/2.

competency—as measured by the heightened standard of care for professionals—to command a 900 foot commercial ship in U.S. waters.

The evidence also suggests that Fleet failed to exercise reasonable care in selecting a competent second mate. On merchant ships, the second mate typically serves as the navigator and is the ship's navigation expert who is responsible for passage planning. The evidence suggests that in this case the mate Fleet selected did not understand the international requirement for berth-to-berth passage planning. It also suggests that the mate was unfamiliar with critical bridge equipment, including, for example, the vessel's VDR and with the principles of Racon.¹⁵⁰

2. FAILURE TO EXERCISE DUE CARE IN TRAINING THE COSCO BUSAN'S MASTER AND MATES

The days when a vessel owner or operator could meet its obligations by simply verifying that all vessel crew members hold a valid license or certificate for the particular capacity in which they are employed are long gone. Indeed, as one court recently explained:

A key contributing factor to the crew's incompetence and hence the vessel's unseaworthiness is the absence of any meaningful training or the implementation of proper procedures for the safe navigation of the vessel Mr. Henry had the utmost faith in his men to independently avail themselves of the latest safety and navigational information. While he avers that he made all Coast Guard regulations available to his crew on his vessels, he made no effort to assure that these manuals were ever read, and the Court believes that they rarely were read. Mr. Henry placed great reliance on the crew members keeping abreast of safety and navigational information pursuant to their license renewal requirements which occurred every five years instead of training them himself. Henry Marine's reliance on others to train its crew for it represents negligent manning of the vessel. The Court

150. Racon (RADar beCON) is a radar transponder used to mark maritime navigational hazards. When a Racon receives a radar pulse from a ship's radar, it responds with a distinctive signal, which generates a short line of dots and dashes forming a Morse character radiating away from the location of the beacon on the vessel's radar display.

finds that Henry Marine provided inadequate training to its crews on all levels from the deckhands through to captain which contributed to the unseaworthiness of the *Mary Sue*.¹⁵¹

In the 21st century, the vessel owner or operator has an ongoing duty to ensure that the crew it employs is competent in the particular type of ship and its equipment and procedures, as set out in documents like the Bridge Procedures Manual and Captain's Standing Orders. Additionally, a crew employed to sail to a foreign port must be given sufficient training to comply with local rules for that country and port. The STCW and ISM Code address some of those needs through their requirement for familiarization training. Specifically, companies are required to ensure that seafarers who are newly assigned to a ship are familiarized with their specific duties and with all ship arrangements, installations, equipment, procedures and ship characteristics that are relevant to their routine or emergency duties.¹⁵² Written instructions are to be issued by the company to each ship to ensure this ship-specific familiarization takes place.¹⁵³ Fleet's SMS for the *Cosco Busan* does, in fact, include such a requirement.¹⁵⁴

The available evidence suggests Fleet failed to exercise due care in training its master and mates for their assignment aboard the *Cosco Busan*. The company's decision to bring the master and all of the deck officers (chief, second and third mates) aboard the day before the ship got underway—barely providing them with enough time to stow their gear and find their way to the bridge—before sailing on a 5,300 mile voyage to California created a dangerous and stressful situation. The master and mates had apparently been ashore for a considerable period of time, up to six months, and had not served together. An operator exercising reasonable care would have utilized classroom and/or simulator training tools to familiarize the new crew with the *Cosco Busan's*

151. *Warrior & Gulf Nav. Co. Limitations Proceedings*: Barge NL 251, 1997 AMC 1432 (S.D. Ala. 1996).

152. See NTSB Report, *supra* note 22, at 28 (citing the ISM Code requirement); 46 C.F.R. §§ 15.405, 15.1105(b) (2011) (citing STCW Reg. I/14).

153. See Navigation and Vessel Inspection Circular No. 4-97, *supra* note 112, enclosure 2.

154. See Fleet Management, Ltd., Shipboard Management Manual, Jun. 1, 2001, section 6, para. 6.4.2 available at <http://dms.nts.gov/public%2F44500-44999%2F44544%2F402082.pdf> (last visited Mar. 3, 2012).

equipment. It would also have built in enough time for them to study the company's SMS, Bridge Procedures Manual and Master's Standing Orders, at least some of which were written in English, which was not the crew's native language.¹⁵⁵

Experience has persuasively demonstrated the need to provide an opportunity for the new crew to engage in "bridge team" training to learn the various navigation details of the duties to which they will be assigned. Effective bridge team performance requires that each team member understand not only his own duties, but also the duties of the other team members and what those team members are expecting from him. Although there is some debate whether an embarked pilot is a "member" of the bridge team,¹⁵⁶ all reasonably prudent ship operators would agree that the bridge team that will be expected to operate the vessel in restricted waters with a pilot aboard must understand their individual role, the pilot's role vis-à-vis the master and watch officer (under the STCW) and their role in *supporting* the pilot in navigation, collision avoidance, communications and course and speed maneuvers (under the Navigation Safety Regulations and STCW).¹⁵⁷

Fleet's failure to train the master and crew might have been attributable in part to the questionable competence of Fleet's senior management. For example, a published statement by a Fleet general manager after the allision manifested a serious misunderstanding of the modern international standards

155. See NTSB Report, *supra* note 22, at 125 & 137 (Recommendation M-09-7).

156. See American Pilots' Association, Pilotage in the United States: Role of the Pilot, available at <http://www.americanpilots.org/PilotageInUS.aspx> (last visited Mar. 3, 2012) (taking the position that the embarked pilot is not a member of the vessel's bridge team).

157. Statements by senior Fleet representative, Captain Nagarajan, who was listed as Fleet's "party representative" in the NTSB proceedings, that the *Cosco Busan* "master might have assessed that if the port is open and the pilot says it's good to go . . . he might have followed the advice of the pilot and got underway" demonstrate that neither the company nor the master understood the vessel's obligation to exercise independent judgment regarding critical navigation safety decisions. Captain Nagarajan was quoted in Dom Yanchunas, *Pilot lost situational awareness in thick fog, NTSB told*, PROFESSIONAL MARINER (June/July 2008), available at <http://www.professionalmariner.com/ME2/dirmod.asp?sid=420C4D38DC9C4E3A903315CDDC65AD72&nm=Archives&type=Publishing&mod=Publication s%3A%3AArticle&mid=8F3A7027421841978F18BE895F87F791&tier=4&id=6783028F680B4C5884538A8B3C383E26>. Such a passive approach is wholly inconsistent with the principles of prudent risk-based management that are now an integral component of the contemporary standard of care.

governing the master-pilot relationship. Specifically, he was quoted as saying that the master will take control from the pilot only if the pilot is "manifestly in distress or manifestly incompetent."¹⁵⁸ The general manager's statement is contrary to the STCW and appears to even be inconsistent with the vessel's SMS provided by the company.¹⁵⁹ It will be recalled that the vessel owner's failure to train its master and crew in an earlier version of this vessel-pilot relationship standard set out in a resolution by the IMO was decisive in the M/V *Summit Venture-Sunshine Skyway Bridge* allision case. Even more telling of the company's failure to prescribe or ensure compliance with these standards is the apparent failure to prepare a passage plan for this voyage, or for prior voyages to Los Angeles/Long Beach.

3. FAILURE TO EXERCISE DUE CARE IN IMPLEMENTING THE REQUIRED SAFETY MANAGEMENT SYSTEM

The ISM Code calls upon the company to develop, implement and maintain a safety management system (SMS), which includes, *inter alia*, "instructions and procedures to ensure safe operation of ships and protection of the marine environment in compliance with international and flag State legislation."¹⁶⁰ The company must ensure the master is "fully conversant" with the SMS¹⁶¹ and that the ship's personnel are familiarized with the SMS and their duties. Compliance with the SMS provisions is to be verified by internal audits *and* management reviews. This ISM Code provision imposes an obligation on the company to provide instructions and procedures to ensure its ship complies with the STCW Code and that it verifies compliance through internal audits and management reviews.

The ISM Code also requires the company to establish procedures for the preparation of plans and instructions for key shipboard operations concerning the safety of the ship and prevention of pollution, and to assign tasks to qualified personnel.¹⁶² A compliant plan will provide clear direction to the master and crew on vessel navigation safety (e.g., passage planning and position fixing), the role of the master and officers

158. *Id.*

159. Fleet's SMS for the *Cosco Busan* stated that the pilot "acts only as an advisor." See NTSB Report, *supra* note 22, at 66.

160. ISM Code, *supra* note 129, at para. 1.4.

161. *Id.* at para. 6.1.

162. *Id.*, at para. 7.

and their relationship to embarked pilots, and additional precautions to be observed in congested waters or during periods of restricted visibility.

Fleet's conduct leading up to the day of the allision demonstrated a cavalier attitude toward the ISM-required principles of safe ship management.¹⁶³ The crew, who sailed the ship from Korea to the United States the day after reporting aboard, surely understood that this company put profits ahead of safety. No ship operator exercising reasonable care would have believed the crew could be trained to the level of minimally required competency the day after reporting aboard by studying voluminous manuals in a foreign language. The fact that Fleet's classification society, Germanischer Lloyd, certified after its pre-audit inspection on October 24th that the master and officers were "familiar with" the SMS and the planned arrangements for its implementation on the very same day that they reported aboard is manifestly implausible.¹⁶⁴

Lacking any formal on-board training organization, process or instructors, Fleet appears to have relied on the master and officers' representation that they viewed a "training video" to fulfill Fleet's obligation to provide adequate training. Finally, in evaluating whether Fleet exercised due care in providing individual and team training for the newly assembled crew, one would have to examine the crew rest logs and interview individual crew members to determine the accuracy of those logs. Particularly on this "maiden" voyage for the new crew, it seems doubtful that the master and mates received the minimum rest

163. Arguments seeking to shift responsibility for the spill to others, such as the pilot, the Coast Guard Captain of the Port for failing to "close" the port or the Vessel Traffic Service for a failure to take control of the vessel are not relevant to the question whether Fleet, as the vessel operator, negligently caused the discharge of oil into San Francisco Bay. The pilot, escort tug, port authorities and VTS were not the *risk-creating* activities in this case. They were *external* risk management measures, which a vessel may choose to employ in its overall approach to managing the risk. There may well be other causes of the spill, some of which might be relevant to the company's civil liability, but they will not excuse a vessel owner's or operator's causative fault, except in the rare case where those acts constituted a superseding cause.

164. Recognizing that liability and hull insurers have a substantial measure of influence over shipowner and operator practices, one would hope that the conduct of the Germanischer Lloyd classification society surveyor in issuing the *Cosco Busan* a Safety Management System certificate on October 25, 2007, will be considered by hull insurers and protection and indemnity associations in rating the professional competency of the organization.

required by the STCW Code.¹⁶⁵ It is well known that crew fatigue seriously undermines crew performance and, therefore, ship safety. A crew short on rest is also much less likely to spend precious off-watch time reading the necessary manuals.

4. FAILURE TO EXERCISE DUE CARE IN SUPERVISING THE VESSEL'S NAVIGATION PLANNING

Pre-departure navigation planning is an integral component of safe ship operations. The minimum detail is set out in the standards for berth-to-berth planning incorporated into the governing international instruments and in the "company's" own manuals. Reasonable care calls for greater detail in planning where the crew will be navigating in unfamiliar waters, restricted or congested waters and where prevailing weather conditions may affect navigation or ship operations. Fleet's on-board marine superintendent knew or had reason to know the ship lacked any kind of passage plan at the time it departed Busan for California. He knew or had reason to know that the plan prepared several days later was a pilot-to-pilot plan that did not extend to the internal waters of the port of LA/Long Beach. He knew or had reason to know that it also lacked a berth-to-berth passage plan for the inbound or outbound transits for San Francisco Bay. These omissions, all of which occurred while Fleet's superintendent was aboard, violated SOLAS and the STCW, and it likely violated Fleet's own guidance manuals. Therefore, the superintendent knew or had ample reason to know that neither the master nor the navigator (ie. second mate) was carrying out their obligations for navigation planning. Yet, despite the presence of an on-board superintendent, Fleet took no steps to correct its employees' omissions until after the allision.

The importance of this omission and the danger it created can only be appreciated by studying the components of a compliant berth-to-berth passage plan. Such a plan, prepared by the navigator/second mate and approved by the master, will include plotted tracklines and waypoints for turns, to inform the other members of the bridge team. The passage plan is also a key component of the master-pilot exchange. Without tracklines and waypoints the bridge team has no means of complying with the U.S. Navigation Safety Regulations or backing up the pilot's

165. See, e.g., STCW Code, *supra* note 110, section A-VIII/1 (requiring 10 hours of rest in any 24 hour period, such rest divided into no more than 2 periods, one of which must be at least 6 hours long). See also *id.* at section B-VIII/1.

navigation, as the STCW requires. But passage planning requires much more—particularly when the visibility may be severely restricted. Without a passage plan for the transit between the Oakland estuary and the San Francisco sea buoy, the ship could do little more than blindly rely on the pilot, who could not see beyond the vessel's bow at the time of the allision. The cost of such sole reliance on the pilot has been well known since 1980, when the *Summit Venture* allided with the Sunshine Skyway Bridge.

5. FAILURE TO EXERCISE DUE CARE IN ASSIGNING SUFFICIENT NAVIGATION WATCH PERSONNEL FOR RESTRICTED WATERS

The evidence suggests Fleet breached its duty to exercise reasonable care in prescribing the *Cosco Busan's* bridge navigation watch organization for restricted waters. By designing a watch organization that put only one mate and the master on the bridge during this critical stage, Fleet virtually ensured that the vessel could not possibly comply with the U.S. Navigation Safety Regulations,¹⁶⁶ the STCW Code¹⁶⁷ or the company's own requirement to take and plot fixes every five minutes. The third mate, who was assigned as the bridge watch officer, had at least three different duties, including operating the engine controls, which is a function that an able seaman, serving as the "lee helmsman" can do, suggesting a need to assign an additional rating (i.e., an able seaman) or even an officer, perhaps the ship's navigator, who was assigned to the ship's fantail, to the restricted waters bridge team. Evidence revealed that throughout the entire in-bound transit to the pier in Oakland the third mate was able to take only one or two fixes. It was negligent to operate with an inadequate bridge team during the in-bound transit; it was reckless to use exactly the same inadequate bridge team in near zero visibility, when electronic navigation would be indispensable.

Through its on-board superintendent, Fleet knew or had reason to know that bridge staffing was inadequate in restricted waters. And if the bridge team staffing was inadequate for the

166. See 33 C.F.R. § 164.11 (2011).

167. See STCW Code, *supra* note 110, section A-VIII/2, para. 47 (requiring fixes at "frequent intervals" using more than one means of navigation whenever circumstances allow). See also *id.* at para. 49 (requiring the ship's crew to maintain an accurate check on the ship's position and movement).

tasks required during such a transit in clear visibility, *a fortiori* it was inadequate when the visibility prevented those on the bridge from seeing beyond the ship's own bow.

6. FAILURE TO EXERCISE DUE CARE IN SUPERVISING EXECUTION OF NAVIGATION PLANS AND PROCEDURES

As the vessel's operator, Fleet's duty extended beyond the obligation to hire a competent master and crew, to train them and to effectively implement its ISM Code-required SMS. It also had a duty to exercise reasonable care in supervising its employee-crew members. In evaluating the practicalities of a ship operator supervising its master crew, it is noteworthy that in this case Fleet had a unique advantage because it had at least one superintendent aboard the ship from the time it left Busan until shortly before it sailed from the Oakland terminal. Presumably with full knowledge of the required procedures in the company's safety manuals and the international standards they incorporated, Fleet's marine superintendent passively looked on as the ship repeatedly violated the requirements for passage planning. The superintendent had actual or constructive knowledge that the bridge team did not take, plot, cross-check and record fixes in those waters at five minute intervals and after every change of course during the in-bound transit, and to report the ship's position to the person directing its movement, the pilot and the master, as the NSRs and manuals required. And Fleet's superintendent knew or should have known the bridge team was inadequate to carry out the tasks assigned to it by the company's manuals or the U.S. Navigation Safety Requirements—even in clear weather, as the in-bound transit demonstrated.

VII. CONCLUSION

The U.S. Department of Justice and Coast Guard are committed to ensuring the integrity of all components of the "vessel safety net," including the vessel owner and operator. The fact that any number of negligent acts on board a vessel may cause an oil discharge provides them with ample opportunities to scrutinize the owner's and operator's conduct and punish vessel negligence, in order to protect the nation's marine environment. Prosecutors have considerable discretion in determining whether to initiate a criminal action in such cases. The U.S. Attorney's Manual cautions "it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance

program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee.”¹⁶⁸ However, where there is evidence supporting direct corporate criminality, or where the corporation obstructs the investigation, a prosecutor is more likely to initiate a criminal prosecution against the corporation. Violations of codes that assign duties directly to the company operating the vessel will increasingly provide the necessary evidence of direct corporate criminality.

Most seasoned mariners would readily conclude that the voyage of the *Cosco Busan* was a disaster in waiting from the moment the ship sailed for California with its newly arrived and assembled crew. The risk factors were manifest before the *Cosco Busan* left the safety of the Oakland terminal. Those risk factors would have been obvious to Fleet’s superintendent before he departed the vessel in Oakland. The vessel’s master and crew—who had already seen the company’s superintendent take no action when they sailed from Busan without the required passage plan—knew from the start where the company’s true priorities were.

Tapes from the vessel’s VDR indicated the bridge team knew the risk of sailing in restricted waters in dense fog was extraordinarily high. Yet no effectively implemented company SMS told the crew to exercise independent judgment and either instruct the pilot that the ship would delay its departure until visibility improved, as four other ships did that morning, or discuss additional risk management measures that could be put in place to bring the risk level within prudent limits. A reasonably prudent shipowner would take steps to ensure that the master never relied solely on a pilot’s judgment regarding risk of getting underway in near zero visibility. No special knowledge of pilot waters is needed to make that risk management decision. Indeed, the situation is the same whether made in San Francisco, Shanghai or Southampton, and should be made by the master, in accordance with the company’s ISM-compliant safety management policy.

As the operator for a 900 foot vessel trading in international commerce, Fleet had a duty to do more than merely deliver thick binders containing an elaborate Safety Management System. It was required to implement that system and to monitor

168. See *supra* note 54 and accompanying text.

compliance with the system by taking reasonable steps to ensure its master and crew understood and carried out their duties respecting safe navigation of the vessel. Its on-board superintendents provided it with a real and continuing ability to do so. Finally, any argument that, because Fleet had only taken over as manager of the vessel a short time before the incident, less safety management oversight was possible, must be flatly rejected. Changes in owners, charterers or operators call for *greater* care during the transition period, and such transitions must never be accepted as a justification for failing to exercise reasonable care. Part of any compliant SMS is a clear line of authority, responsibility and, therefore, accountability. In this case a foreign flag vessel was sent to California by an operator who failed to build in adequate time to effectively implement its SMS or ensure the master and crew were trained in the operator's policies and procedures. The situation may have been aggravated by the complex organization of owners, operators and managers, which muddled accountability and responsibility. A company's business decision to erect or reshuffle a complex corporate organization to serve its commercial ends and to dispatch its newly-acquired ship with almost no transition time for the new crew can never be accepted as an excuse for temporarily relaxing the requirement to exercise due care.